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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1941

VOLUME 3

Consulting Editor:
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Recorder of Cambridge.
Managing Editor of Halsbury's Laws of England Hailsham Edition.

Consulting Editor for Chancery Cases:
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Published by the Proprietors of
THE LAW JOURNAL, 37-39 ESSEX STREET, LONDON, W.C.2

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CORRECTIONS

[1941] Vol. 2, p. 308: *Barrett v. Gravesend Assessment Committee.* In the third line of the HELD read "when the proposal was made."

P. 458, *ante. Pritchard Jones v. Le Vaye.* The Solicitors for the appellant were *Shindler & Co.*

Printed by R. J. ACFORD, LTD., Little London, Chichester, Sussex.

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

LOTINGA *v.* NORTH EASTERN MARINE ENGINEERING CO. (1938), LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Tucker, J.), **July 23, 1941.**]

Factories—Dangerous machinery—Travelling crane—Men working in or near wheel-track—Employers' duty to ensure safety—Absolute duty—Exhibition of notice insufficient—Factories Act, 1937 (*c.* 67), *s.* 24 (7).

An employee of the respondents was working near the wheel-track of a large overhead travelling crane, where he was killed by the movement of the crane. A notice was exhibited in the vicinity of the place that cranes must not approach within 20ft. of men working there and that workmen must notify cranemen of their presence there before starting work. The magistrates found that the system of work in use had been employed for 37 years without accident and that the accident was due to one of the respondents' workmen, well aware of the danger, deferring to take action by warning the craneman until it was too late to avert the danger. It was also found that it was impracticable for the craneman to look out for men at work in or near the wheel-track. Upon these findings they refused to convict the respondents of an offence against the Factories Act, 1937, s. 24 (7) :—

HELD : the above subsection imposes an absolute duty to take effective steps by warning the driver of the crane or otherwise to ensure that the crane shall not approach within 20ft. of the place where men are working on or near the wheel-track of the crane. The respondents had failed to carry out this duty and should have been convicted.

[**EDITORIAL NOTE.** Decisions of this type are necessarily of a negative character. It is not for the court or the Act to state how safety in working dangerous machines is to be ensured, but, where the Act places on employers an absolute duty to ensure safety, it is no answer to say that the system adopted has been worked for very many years without mishap, nor is it a sufficient compliance with the statutory provision to post notices warning workmen or giving them instructions to warn others of their presence in the danger zone. The employers must make such arrangements and take such precautions that the safety of the workmen is ensured.

AS TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-603, paras. 1130-1146 ; and FOR CASES, see DIGEST, Vol. 24, pp. 908-913, Nos. 62-85.]

Case referred to :

(1) *Sutherland* v. *Mills* (*James*), *Ltd., Executors,* [1938] 1 All E.R. 283 ; Digest Supp.

APPEAL by the inspector of factories by way of case stated from a decision of the justices of the peace for the borough of Wallsend dismissing an information by a factory inspector against the respondent company to the effect that they had contravened the Factories Act, 1937, s. 24 (7). The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

The notice referred to in the judgment was in the following terms :

> Cranes must not approach within 20ft. of men working on this gantry. Workmen must notify cranemen of their presence on this gantry before starting work.

Hon. H. L. Parker for the appellant.

J. Harvey Robson for the respondents.

Viscount Caldecote, L.C.J.: In this case, it is alleged that a man named Dawson was working near the wheel-track of a 60-ton overhead travelling crane in the erecting shop, in a place where he was liable to be struck by the crane, without effective measures having been taken to ensure that the crane did not approach within 20ft. of the place where he was working. The evidence as found by the magistrates was that this man and two other workmen were employed upon the floor of a gantry, where they were in danger of injury from the movement of the overhead crane, that they had done work similar to that upon which they were engaged, which was that of hoisting the switch on to the gantry and then putting it into position on a steel column, and that they were aware of the danger. It was also found that notices were posted and maintained in the vicinity of this place, which is apparently called a danger zone, warning persons who have to work in this position that they must warn the crane-drivers concerned. The crane-drivers, we are told, cannot look out themselves to see whether there are men in this dangerous position, as they have other duties to attend to. They expect to be warned by the workmen about to work in such a position of danger, and they regularly receive and work on such warnings. The magistrates also found that the crane-driver concerned in this accident had had 37 years' experience of driving the crane in this particular shop and had never before had an accident of this nature. On this occasion, the unfortunate result of the absence of any warning being given to the crane-driver was that Ernest Dawson was killed.

This information is laid under the Factories Act, 1937, s. 24 (7), which provides as follows :

> If any person is employed or working on or near the wheel-track of an overhead travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken by warning the driver of the crane or otherwise to ensure that the crane does not approach within 20ft. of that place.

It is not superfluous to remember that the Factories Act, 1937, which is the latest of many Acts dealing with the safety of workpeople, is more stringent in its terms than any preceding legislation. This particular section appears in a part of the Act which deals with safety. Some of the sections in that part, like sect. 24, deal with peculiarly dangerous machines and make special provisions with regard to them, as Lord

HEWART, L.C.J., said in *Sutherland* v. *Mills* (*James*), *Ltd.*, *Executors* (1), at p. 285 :

> A large part of the purpose of these statutes was to save workmen from themselves. That is to say, not to save them from deliberate acts of mischief, but to save them from consequences which they may incur, if, in haste, hurry, carelessness, or, it may be, indolence, they do something in a way in which they ought not to do it . . .

In this particular case, it is said that the obligation resting upon the employers had been discharged because they put up notices forbidding cranes to approach within 20ft. of men working on this gantry and enjoining workmen to notify crane-men of their presence on this gantry before starting work. The magistrates, having heard evidence to the effect that the present system was one which had been in force for 37 years without an accident ever before having taken place, have found that it was unreasonable to condemn as ineffective the measures taken by the respondents in this case. Then this is worth noticing. They say :

> That such failure arose from the act of one of the respondents' workmen, who, not by reason of ignorance, neglect or carelessness, but well aware of the danger, and of his duty to take the action designed to avert it, chose in his judgment—unhappily wrong—to defer taking action until what he thought would be a more suitable time.

If that is not putting the responsibility upon the workman, I can hardly imagine any language which would be more likely to have that effect. The plain meaning of that finding of the magistrates is that it was the duty of the workman to take action designed to avert the accident, that he exercised a wrong judgment in failing to discharge that duty, and that, in consequence, the respondents had not failed in their duty. The duty under the Act is put upon the employer, and not upon the workman. They are strong words. The section requires that :

> . . . effective measures shall be taken . . . to ensure that the crane does not approach within 20ft. of that place.

So far as the evidence in this case discloses the facts, no measures at all were taken, either by warning or otherwise, to prevent the crane from approaching within 20ft. of where the workpeople were working, but what was done was that a general notice was exhibited, in terms which did not correspond very closely with the terms of the section, ordering the workpeople to take steps for their own protection.

In my judgment, the magistrates arrived at a wrong decision. I think that they went wrong because, perhaps, they were captivated —indeed, their case shows it—by the idea that, because an accident had not taken place for a great number of years, the procedure which had been followed during those years must be effective. I think that that is wrong. Effective steps were not taken in this case, and steps were not taken to ensure that the crane did not come within 20ft. of where these workmen were working. To find otherwise would be to water down the provisions of this section under the Act of 1937, which were intended, apparently, by the strongest words that the draftsman could choose, to place an absolute obligation upon the employer.

This court has always been slow to listen to any argument which in effect waters down provisions which place an absolute duty upon the employer and transfers that duty to the workman. The argument presented to us here bears some similarity to that which was addressed to the court in *Sutherland* v. *Mills* (*James*), *Ltd.*, *Executors* (1). The argument there was that the user of a particular machine without accident for a very long period was proof that the machine was not a dangerous machine. As I say, the argument in this case has a certain similarity to the argument in that case. In my judgment, the magistrates here arrived at a wrong decision because they directed their minds to the wrong point. The point which they should have considered was whether or not effective steps were taken on this occasion, and, as there was no evidence of any effective steps having been taken on this occasion, whether due to somebody's fault or not, in my opinion, the offence was proved.

TUCKER, J.: I agree. In my opinion, this case is a very clear one. The Factories Act, 1937, s. 24 (7), is in these words:

> If any person is employed or working on or near the wheel-track of an overhead travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken by warning the driver of the crane or otherwise to ensure that the crane does not approach within 20ft. of that place.

It will be observed that two of the words in that section are "effective" and "ensure." In my view, this subsection imposed an absolute obligation on the employers to produce the result that, in the circumstances stated in that subsection, the crane shall not approach within 20ft. of where the workman is working. In my view, that obligation is just as absolute as that which is imposed under sect. 14, which provides that certain machinery shall be securely fenced. That is a section under which there have been many decisions, and it is a section with which the courts are very familiar. It was argued in this case that subsect. (7) does not impose an absolute duty, but I think that, in effect, the justices have construed this subsection as if it said that, in the circumstances stated, the employers should take reasonable steps to secure the safety of the persons concerned. Those are not the words used. The words used are that they shall take effective measures to ensure a certain result. On the facts shown in this case, they did not do that. In my view, there is no defence to this information, and the case should be remitted to the justices with the direction that they should convict.

Appeal allowed with costs. Case remitted to the justices with a direction to convict.

Solicitors: *Treasury Solicitor* (for the appellant); *Middleton & Co.*, Sunderland (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re STAPLETON-BRETHERTON, WELD BLUNDELL *v.* STAPLETON-BRETHERTON

[CHANCERY DIVISION (Simonds, J.), **July 3, 22, 1941.**]

Contract—Performance—Mode of performance—Contract between brothers to provide for families—Death of one brother—Whether survivor can insist on paying allowances to members of brother's family or must pay brother's executors.

In 1918, two brothers, who were entitled successively as tenant for life in remainder, were desirous of making provision for their respective families. They executed a deed in which Frederick, who was first entitled, covenanted with his brother Edmond that, if he survived his father and succeeded to the settled estate, he would, during his lifetime, pay to Edmond during his life, and after his death to his widow during her life, the annual sum of £1,000. Edmond covenanted with Frederick that, if Frederick survived his father and died without male issue, or if he died in the lifetime of his father, he, Edmond, would, if he succeeded to the settled estates, pay such an annual sum to Frederick's wife and daughters as would, with certain other income, make up the widow's income to the sum of £1,000 per annum, and also would, in the same circumstances, during his life pay to each of Frederick's two daughters such an annual sum as would, with certain other income, make up the annual income of each of them to £300. The father died in 1919, and Frederick succeeded to the settled estates. He paid his brother £1,000 per annum until he died in 1938 leaving a widow and two daughters, when Edmond succeeded to the settled estates as tenant for life in possession. The summons was taken out by the executors to determine (i) whether there was a trust of these annual sums in favour of Frederick's widow and daughters, or (ii) whether these sums formed part of the testator's estate. The executors contended that the consideration came entirely from him, and that they alone were entitled to receive payment, while the covenantor, Edmond, opposed this contention :—

HELD : (i) there was no trust created in favour of the widow and daughters, and there was nothing in the deed to suggest that the covenanting parties were trustees for those benefiting under the covenants.

(ii) the sums did not form part of the testator's estate, the proper inference being that the destination of the payment was an essential part of the bargain to the covenantor. The sums were, therefore, payable not to the executors, but to the named beneficiaries, the covenantor being entitled to perform his obligation in the manner in which he had agreed to perform it.

[**EDITORIAL NOTE.** It is settled law that only the parties to a contract can enforce it. After the death of a party, his personal representatives can, of course, enforce it, but, if they, as a result of such proceedings, receive a sum of money, it would, in the ordinary course, be a part of the deceased's estate and liable to satisfy the liabilities thereof to creditors or legatees. In the present case this would have defeated the purpose of the contracting parties, and it is held that the surviving party to the contract is entitled to fulfil his contract by paying the annual sums to the persons named in the contract. It will be noted that the contract was not worded so as to create a trust for those persons.

AS TO MODE OF PERFORMANCE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 188-190, para. 267 ; and FOR CASES, see DIGEST, Vol. 12, pp. 304-306, Nos. 2506-2531.]

Cases referred to :

(1) *Cleaver* v. *Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147 ; 43 Digest 657, *903* ; 61 L.J.Q.B. 128 ; 66 L.T. 220.

(2) *Re Engelbach's Estate, Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348 ; 43 Digest 567, *165* ; 93 L.J.Ch. 616 ; 130 L.T. 401.
(3) *Re Sinclair's Life Policy*, [1938] Ch. 799 ; [1938] 3 All E.R. 124 ; Digest Supp. ; 107 L.J.Ch. 405 ; 159 L.T. 189.

Summons to determine the construction of covenants contained in a deed dated Oct. 18, 1918, and made between Frederick Bartholomew Stapleton-Bretherton and Edmond Joseph Stapleton-Bretherton. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the plaintiffs, the executors.

W. P. Spens, K.C., and *A. H. Droop* for the first three defendants, the widow and daughters.

W. F. Waite for the fourth defendant, the surviving covenanting party.

Simonds, J.: Frederick Bartholomew Stapleton-Bretherton and Edmond Joseph Stapleton-Bretherton were brothers, the sons of Frederick Stapleton-Bretherton, who in 1918, under the will of Mary Stapleton-Bretherton, was tenant for life in possession of certain settled estates in Lancashire and elsewhere. Frederick Bartholomew Stapleton-Bretherton was tenant for life in remainder of the same estates, which were further limited to certain uses under which Edmond Joseph might become tenant for life thereof. By a settlement made on Aug. 28, 1894, Frederick Bartholomew Stapleton-Bretherton had covenanted with his then present wife, Bertha May Stapleton-Bretherton, that, in the event of his death in the lifetime of his father, he would pay her the sum of £300 per annum during her life or until she should remarry, and he also covenanted to pay, during his life, the sum of £100 per annum to each of his two daughters. In the event of Frederick Bartholomew Stapleton-Bretherton surviving his father and becoming entitled in possession to the settled estate, his wife Bertha would, on his death, become entitled to a jointure rentcharge not exceeding £700 per annum, and each of his daughters would become entitled to a capital sum of £1,000.

In Oct., 1918, the Great War was still being fought, and the brothers were anxious to make some arrangement which would in any contingency provide for their respective wives and families. Accordingly, on Oct. 18, 1918, they executed a deed to which they, and they only, were parties, whereby, after reciting the facts which I have already stated, each of them entered into covenants with the other. Frederick covenanted with Edmond that, if he survived his father and succeeded to the settled estates, he would, during his lifetime, pay to Edmond during his life, and after his death to his widow during her life, the annual sum of £1,000. Edmond covenanted with Frederick that, if Frederick survived his father and died without male issue, or if he died in the lifetime of his father, he, Edmond, would, if he succeeded to the settled estates, pay to Frederick's wife Bertha such annual sum as would, with certain other income, make up her income to the sum of £1,000 per annum, and also would, in the same circumstances, during his life pay to each of Frederick's two daughters, Ruth and Stella, such an annual sum as would, with certain other income, make up the annual income of each of them to £300.

Frederick, the father, died on Apr. 13, 1919, and Frederick Bartholomew, the son, then succeeded to the settled estates. He died on Oct. 13, 1938, leaving his widow Bertha and his two daughters him surviving, but no sons, and thereupon Edmond succeeded to the settled estates as tenant for life in possession. Frederick, in pursuance of his covenant, paid Edmond £1,000 per annum until his death. The obligation of Edmond arises under his covenant, and the question is by whom it can be enforced and what its effect is. The summons as originally drawn asked whether the sums paid or to be paid by Edmond under his covenant—that is, the annual sums required to make up the incomes of the widow and daughters to a certain amount—were impressed with trusts in favour of them respectively or formed part of the estate of Frederick, the covenantee. This ignored the possibility that, even though there might be no trust in favour of the widow and daughters, yet Edmond, the covenantor, might discharge his obligation by paying the covenanted sums to them so that such sums would never reach and form part of the estate of Frederick. The summons was accordingly amended so as to enable this question also to be raised.

I have already decided, and it seems clear beyond all doubt, that no trust in favour of the widow and daughters of Frederick is created by the deed of covenant. They are not parties to the deed, and there is not to be found in it one word which suggests that either Frederick or Edmond was a trustee for any third party of the benefit of any covenant, or of any sum of money which might be paid thereunder. The case is covered by such authorities as *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (1), *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (2) and *Re Sinclair's Life Policy* (3). The more difficult question is that raised by the amendment, which I have taken time to consider. Edmond, the covenantor, claims that he is entitled to fulfil his covenant according to its terms by paying the stipulated sums to the widow and daughters of Frederick. On the other hand, Frederick's executors claim that the consideration for the covenant came from Frederick, that they alone are entitled to enforce the covenant, and that they can require its fulfilment by payment to them. In effect, they say that, since they alone can sue, they alone can give a valid receipt, and that they will give it only if the money is paid as they require. They rely upon a passage in the judgment of LORD ESHER, M.R., in *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (1), at p. 153:

> I should say that, on the true construction of the policy, the only persons who could claim under it, and give a valid receipt for the money insured, were the executors of the insured.

I do not think that this claim by the executors is well-founded. Where, as in *Cleaver's* case (1) and in the other insurance policy cases which I have cited, the proper inference from the document itself, and from such surrounding circumstances as may properly be taken into consideration, is that the destination of the covenanted sums is a matter of indifference to the covenantor, so that the designated payee may be regarded as the nominee of the covenantee, and as a matter of construction the covenant can be read as if the words "or as the covenantee may direct" were inserted after the name of the payee, then it may well be that the covenantee, or his executors, can unilaterally vary the terms of the obligation and require a mode of payment different from that expressly prescribed. Where, on the other hand, the proper inference is that the destination of the payment is to the covenantor an essential part of the bargain, then it cannot be varied except by the consent of both contracting parties. Here I should have no doubt, apart altogether from Edmond's statement to that effect, that it was a matter of concern to him, as it was to Frederick, that in certain events provision should be made for Frederick's widow and daughters, and that part at least of his object in making the arrangement would be defeated if the sums which he had agreed to pay went to Frederick's creditors or legatees and he might be left to make further provision, as a matter of affection or family obligation, for the widow and daughters. In such circumstances, he is, in my judgment, entitled to perform his obligation in the way in which he agreed to perform it, and to decline to perform it in any other way. Therefore, I answer the question raised by the amended summons by saying that the plaintiffs, as executors of Frederick Bartholomew Stapleton-Bretherton, are not entitled to direct Edmond to pay the covenanted sums to them instead of to the persons named in the deed.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate of the deceased brother.

Solicitors: *Taylor, Kirkman & Mainprice*, Manchester (for the plaintiffs and for the fourth defendant); *Taylor & Humbert* (for the first three defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

POPE *v.* BEAUMONT

[King's Bench Division (Macnaghten, J.), **July 11, 14, 1941.**]

Income Tax — Deduction against profits — Industrial society — Member — Division or return in proportion to purchases—Dividend—Rebate or discount—Finance Act, 1933 (*c*. 19), *s*. 31 (1), (3).

The respondent purchased meat for the purposes of his trade from a co-operative society, of which he was a member, and held 3 shares. During the year ended Apr. 5, 1940, the respondent purchased meat to the value of £591 from the society. In that year the society decided to apply part of their profits, in accordance with their rules, "to a division, or return, to or among members of the society in proportion to the amount of their purchases during" the year. In accordance with this decision the respondent received £51 from the society. The Finance Act, 1933, s. 31 (3) provides that any sums which represent a discount, rebate, dividend, or bonus granted by such a society to members in respect of amounts paid or payable to or by them on account of their transactions with the society are to be deducted in computing the society's liability to income tax where such sums are calculated by reference to the amounts or to the magnitude of the transactions and not by reference to the holding of any share or interest in the capital of the society. The respondent contended that he was not liable to pay income tax on the amount which he had received from the society :—

Held : the payment was not a dividend, but a rebate or discount in the hands of the respondent and must be included in his trading account for the purposes of income tax.

[**EDITORIAL NOTE**. In general a rebate or discount allowed to a trader has to be included in his trading account. It is not uncommon for co-operative societies to speak of these returns as dividends, but they differ, of course, from dividends, in that they are calculated on the business done with the society and not on the share capital held. The Finance Act, 1933, s. 31 (3) exempts these discounts from tax in the hands of the society, and it is argued that, therefore, they should also be exempt in the hands of the member. It is decided, however, that they must be brought into the member's trading account in the same way as any other discount.

As to Rebates, see HALSBURY, Hailsham Edn., Vol. 17, p. 148, para. 307 ; and for Cases, see DIGEST, Supp. Income Tax, No. 220*a*.]

Appeal by the Crown from a decision of the Special Commissioners for the purposes of the Income Tax Acts. The facts are fully set out in the judgment.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the appellant.

Frederick Grant (for *J. Alan Bell* on war service) for the respondent.

Macnaghten, J. : In this case, the respondent carries on the business of a grillroom and restaurant proprietor at Stockton-on-Tees, and for the purposes of his trade he purchases meat from the Stockton-on-Tees Co-operative Society. He is a member of that society and holds three shares in it. By r. 24 of the rules of the society, it is provided as follows :

> The net profits of all business carried on by the society, after providing for expenses of management, interest on loans, deposits or paid-up shares, and depreciation of property and fixed stock, may be applied (*a*) To the establishment of or contribution to a dividend equalisation fund. (*b*) To special depreciation of property and fixed stock. (*c*) To the establishment of a reserve fund, which shall be credited

> with interest at same rate as paid to share capital. All undivided profit shall be added to this fund. (*d*) To a division, or return, to or among members of the society in proportion to the amount of their purchases during the period to which the division relates. (*e*) To non-members who have made purchases from the society during such period according to the amount of their purchases, provided that the sum so divided shall not exceed one-half of the sum to which they would be entitled as members. (*f*) In paying subscriptions to the Co-operative Union while the society remains a member.

During the year ending Apr. 5, 1940, Beaumont for the purposes of his trade bought meat from the society at the price of £591. In that year the society made profits, and it was decided to apply part of the profits, in accordance with r. 24 (*d*):

> . . . to a division, or return, to or among members of the society in proportion to the amount of their purchases during [the year].

The "dividend" or "return" so received by Beaumont in proportion to the amount of his purchases was the sum of £51. The question is whether the £51 should be included in Beaumont's trading account for the year as a rebate or discount in respect of the £591 paid by him for the meat which he bought from the society.

It is provided by the Finance Act, 1933, s. 31 (1), as follows:

> In the application to any company or society of any provision or rule relating to profits or gains chargeable under Sched. D, Case I . . . any reference to profits or gains shall be deemed to include a reference to a profit or surplus arising from transactions of the company or society with its members which would be included in profits or gains for the purposes of that provision or rule if those transactions were transactions with non-members, and the profit or surplus aforesaid shall be determined for the purposes of that provision or rule on the same principles as those on which profits or gains arising from transactions with non-members would be so determined.

Subsect. (3) of that section provides as follows:

> It is hereby declared that in computing, for the purposes of any provision or rule mentioned in subsect. (1) of this section, any profits or gains of a company or society which include any income which is chargeable to tax by virtue of the foregoing provisions of this section, there are to be deducted as expenses any sums which (*a*) represent a discount, rebate, dividend, or bonus granted by the company or society to members or other persons in respect of amounts paid or payable by or to them on account of their transactions with the company or society, being transactions which are taken into account in the said computation; and (*b*) are calculated by reference to the said amounts or to the magnitude of the said transactions and not by reference to the amount of any share or interest in the capital of the company or society.

The result of that section is that, although this sum of £51 which is paid or returned by the society to Beaumont formed part of the net profits of the business of the society, nevertheless, in the calculation of the society's liability to income tax, that £51—and also, of course, all other sums paid to other persons in accordance with r. 24 (*d*)—would be exempted from tax.

It was argued by counsel for the respondent that this £51 was not a rebate or discount, but was a "dividend" to the respondent by reason of his membership of the society, and that, since the society is exempt from paying tax on that sum, the respondent also should be exempt. The special commissioners held that this contention was correct and that the £51 ought not to be included in his trading account. The question is, was it a rebate or discount? It seems to me plain that it was. It is described in the rule as "a division, or return, to or among members of the society."

The words "dividend" and "return" are both, as it seems to me, appropriate to describe it. Looked at from the point of view of the society, it was a dividend. It was part of a sum which the society was dividing. Looked at from the point of view of the purchaser of the meat, it was a "return" to him of part of the price which he had paid. It is quite true that it was not a return to which he was entitled as of right. Whether or not he got a return depended entirely upon the decision of the society to apply part of the profits in making such a return. However, when the society has decided out of its profits to make a return to customers, either members or non-members of the society, it appears to be clear that that is a rebate or discount on the price which the customers have paid. I think that the decision of the special commissioners was erroneous, and that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *J. E. Freeman & Son*, Darlington (for the respondent).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re A DEBTOR (NO. 1 OF 1941), DEBTOR *v.* PETITIONING CREDITOR AND OFFICIAL RECEIVER.

[CHANCERY DIVISION (Farwell and Morton, JJ.), **May 12, June 30, July 28, 1941.**]

Bankruptcy—Lunatic—Power to make receiving order—Receiver in lunacy already appointed—Divesting of title of trustee in bankruptcy by appointment of receiver.

By an order of the Master in Lunacy, dated Mar. 4, 1941, the Official Solicitor was appointed receiver of the property of the debtor. On Jan. 28, 1941, the debtor had committed an act of bankruptcy, and on Mar. 17, 1941, a receiving order was made against him by the registrar of the county court. The court was asked to set aside the receiving order on the grounds (i) that a lunatic could not be made a bankrupt, or at any rate only by the direction of the court in lunacy, and (ii) that a receiving order ought not to have been made, having regard to the orders already made by the court in lunacy and the fact that the title of trustee in bankruptcy would relate back to Jan. 28:—

HELD: (i) a lunatic not so found could be adjudicated bankrupt. Having regard to the bankruptcy and lunacy legislation, it did not appear to be the intention of the legislature that a lunatic could not be made bankrupt.

(ii) the trustee in bankruptcy would be in no better position than the debtor and would take subject to the title of the receiver. Although the trustee's title would relate back to Jan. 28, *i.e.*, before the date of the appointment of the receiver, yet his title, like that of the patient, would be divested by that appointment.

[**EDITORIAL NOTE.** There is no doubt that a lunatic can be adjudicated a bankrupt under the direction of the court in lunacy, for there would be no conflict of jurisdiction. The question here was whether the adjudication could be made without the concurrence of the court in lunacy and, indeed, the receiving order appealed against was made in face of the opposition of the lunatic's receiver. There being no authority precisely in point, the court was free to form its own view and has decided that the lunatic can be adjudicated bankrupt, but that the title of the trustee, although it was in this case complete—by relation back—before the appointment of the receiver, would be divested by that appointment and the real control of the lunatic's property would rest with the receiver. It is stated that the position is the same whether or not the lunatic is so found by inquisition, but procedure by way of inquisition is now seldom, if ever, resorted to and references to it may for practical purposes be disregarded.

As to Bankruptcy of Lunatics, see HALSBURY, Hailsham Edn., Vol. 2, pp. 12, 13, paras. 13, 14; and for Cases, see DIGEST, Vol. 4, pp. 30, 31, Nos. 238-250.]

Cases referred to:

(1) *Re Farnham*, [1895] 2 Ch. 799; 4 Digest 30, *243*; 64 L.J.Ch. 717; 73 L.T. 231.
(2) *Crispe* v. *Perrit* (1744), Willes, 467; 4 Digest 112, *1008*.
(3) *Ex p. Layton, Ex p. Hardwicke* (1801), 6 Ves. 434; 4 Digest 29, *229*.
(4) *Anon.* (1807), 13 Ves. 590; 4 Digest 30, *240*.
(5) *Re Spence, Ex p. Stamp* (1846), De G. 345; 4 Digest 30, *239*.
(6) *Re James* (1884), 12 Q.B.D. 332; 4 Digest 30, *246*; 53 L.J.Q.B. 575; 50 L.T. 471.
(7) *Re Cahen, Ex p. Cahen* (1879), 10 Ch.D. 183; 4 Digest 30, *248*; 39 L.T. 645.
(8) *Re Lee* (1883), 23 Ch.D. 216; 4 Digest 30, *244*; 48 L.T. 193.
(9) *Re Farnham*, [1896] 1 Ch. 836; 4 Digest 30, *250*; 65 L.J.Ch. 456; 74 L.T. 214.

Appeal by the Official Solicitor from a receiving order made against the debtor by the registrar of the Barrow-in-Furness and Ulverston County Court on Mar. 17, 1941. The facts are fully set out in the judgment of the court delivered by Morton, J.

V. R. Aronson for the appellant, the Official Solicitor.

Gilbert Beyfus, K.C., and *G. F. Kingham* for the respondents, the petitioning creditors.

Morton, J. [delivering the judgment of the court]: On Jan. 8, 1941, the petitioning creditors recovered judgment against the debtor for £1,114 4*s*. 9*d*. and £11 18*s*. 6*d*. costs. On Jan. 21, 1941 a bankruptcy notice was served on the debtor requiring him to pay the total sum of £1,126 3*s*. 3*d*. This sum was not paid, and accordingly the debtor committed an act of bankruptcy on Jan. 28, 1941, seven days after service of the bankruptcy notice. In the meantime, on Jan. 22, 1941, the debtor's mother had applied to the court in lunacy for the appointment of a receiver. On Jan. 30, 1941, a bankruptcy petition was presented. On Feb. 18, 1941, an order was made by the Master in Lunacy appointing the Official Solicitor to be receiver *ad interim* until the hearing on Mar. 4, 1941, of the above-mentioned application by the debtor's mother. The receiver was ordered to take possession of the furniture, goods, chattels and effects and all other real and personal property belonging to the patient (the debtor), and to take such steps as might be necessary for the protection thereof. On Mar. 4, 1941, an order was made by the Master in Lunacy, to which we must refer in rather more detail. It contains a recital in the following terms:

> . . . and the master pursuant to r. 57 having directed one of the Lord Chancellor's visitors to visit and report upon the patient and one of the visitors having duly visited and reported as in the said rule provided namely that the patient is by reason of mental disability incapable of managing his affairs . . .

The operative part of the order contains the following provisions, *inter alia*:

> 1. The Official Solicitor is appointed receiver in this matter but with such powers only as may be conferred upon him by this or any subsequent order or direction under the seal of the master. 2. The receiver is to take possession of the furniture, goods, chattels and effects and all other real and personal property belonging to the patient and to take such steps as may be necessary for the protection thereof. 3. As from the date hereof so much as may be necessary not exceeding the net income of the patient is allowed for his maintenance. 4. The receiver is authorised in the name and on behalf of the patient to receive and give a discharge for: (*a*) The rents and profits including all arrears thereof of the freehold property to which the patient is entitled with power to manage and let the same for any period or periods not exceeding three years and to pay all proper outgoings in respect thereof. (*b*) The rents and profits including all arrears thereof of the freehold property of which the patient is tenant for life within the meaning of the Settled Land Act 1925 with power to manage and let the same for any period or periods not exceeding three years and to pay all proper outgoings in respect thereof. (*c*) All directors' or other fees dividends interest and income and all arrears thereof respectively to which the patient is or may become entitled and also to receive all notices affecting the patient or his property. 5. The receiver is authorised and directed to investigate and report to the master as to (i) what arrangements should in the best interests of the patient be made for his future treatment care and maintenance; (ii) particulars of the real and personal estate property and effects of the patient and his financial interest therein and the desirability of discharging any encumbrances on any of the real property; (iii) the debts of the patient and whether the same or any of them are secured and if so how and as to what arrangements should be made for the payment of the same (including the applicant's taxed costs of this application); (iv) whether any property of the patient has been disposed of by him without proper consideration and if so to whom and whether any such property is in the custody or under the control of any and if so what persons and what steps should be taken for the recovery thereof.

This order was followed on Mar. 17, 1941, by the receiving order which we are now asked to discharge.

From the above statement of facts, it is manifest that, before any order was made by the court in lunacy, the debtor had committed an act of bankruptcy. If the receiving order is allowed to stand, and if the debtor is subsequently adjudicated bankrupt, his bankruptcy will be deemed to have relation back to, and to commence at, a date prior to the date on which any order was made by the court in lunacy: Bankruptcy Act, 1914, s. 37.

The appellant in this case is the Official Solicitor, who has been appointed under the Bankruptcy Rules, 1915, r. 297, to appear for, represent, and act for and in the name of the debtor. He asks this court to discharge the receiving order made by the registrar, and to dismiss the bankruptcy petition. Counsel for the appellant contends, first, that a person in the position of the debtor—that is to say, a person of unsound mind not so found by inquisition—cannot be adjudicated a bankrupt, or, alternatively, cannot be adjudicated a bankrupt otherwise than under the direction of the court in lunacy. Secondly, he contends that, even if his first contention is wrong, a receiving order ought not to have been made in the present case, having regard to the orders already made by the court in lunacy. We entertain no doubt that a person of unsound mind (whether so found by inquisition or not) can be adjudicated a bankrupt under the direction of the court in lunacy. In our view, this is well-settled by authority, and was treated as being so settled in *Re Farnham* (1), to which we must refer later. In the present case, however, the receiving order was made in the face of opposition by the debtor's quasi-committee, and it becomes necessary for us to consider whether such a person can be adjudicated bankrupt without the concurrence of the court in lunacy. In considering this question, we see no grounds upon which a distinction can be drawn between a lunatic so found by inquisition and a person of unsound mind not so found. It is to be observed that the provisions of the Lunacy Act, 1890, relating to management and administration apply equally to a lunatic so found by inquisition and to a person in the position of the debtor in the present case.

The question which we now have to decide was expressly left open by the Court of Appeal in *Re Farnham* (1). That was a case of a lunatic so found by inquisition, and Lindley, L.J., said, at pp. 806, 807:

> Now, the legal questions which arise are these: First of all, there is the broad question—and it is an important one—whether a person who has been found lunatic by inquisition can be adjudicated a bankrupt at all. That question is by no means so free from difficulty as at first sight appears. There is no doubt whatever that the Bankruptcy Act, 1890, s. 1, applies in terms to all debtors; and, as has been pointed out in argument, all debtors include not only lunatics but infants; but there may be a difficulty in holding that an infant could be adjudicated a bankrupt under that section, and a difficulty in holding that a lunatic can be so adjudicated. It appears that this doubt about the validity of adjudications in bankruptcy against lunatics is a very old one, and has not yet been altogether removed; and I do not propose on the present occasion to solve that doubt. If it were necessary to do so, I should like to look a little more closely than I have done into the course that legislation has taken about lunatics and into the authorities; but I shall assume for the purpose of this decision that Mr. Farnham has been validly adjudicated a bankrupt, and that his trustee has been validly appointed.

Later, Lindley, L.J., said, at p. 807:

> . . . although I believe it is perfectly well-settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under the order of the judge in lunacy, there is a question whether he can be validly so adjudicated apart from that.

Again, in the course of the argument, Lindley, L.J., said that the question had been an open one since the time of Lord Eldon. Lopes, L.J., also left the question open, and Rigby, L.J., said, at pp. 810, 811:

> I am not myself satisfied that there can be an adjudication in bankruptcy against a lunatic otherwise than through the judge in lunacy directing the committee in the name of the lunatic to commit an act of bankruptcy. Without that direction there are reasons which show that it is difficult to see how an adjudication in bankruptcy can operate as against a lunatic, however it is brought about. How can a lunatic commit an act of bankruptcy? That is one question that has to be answered. Again, how can the jurisdiction of the court of bankruptcy be set up, without the consent of the judge in lunacy, as against the jurisdiction and the administration of the judge in lunacy? By the prerogative of the Crown, which has been exercised for centuries through the Lord Chancellor with the addition in recent times of the Lords Justices, the care of the lunatic and the disposition of his estate are vested in the judges in lunacy; and during the centuries in which that jurisdiction has been

> exercised certain rules have been laid down, and among them a rule which appears in the first instance harsh—that, notwithstanding the just claims of creditors, the lunatic must be taken care of first, that is, that he must have proper maintenance provided for him before the creditors can take a single penny. That is the law as it has been administered for a very long time indeed. As to whether a lunatic can be adjudicated bankrupt, otherwise than under the direction of the judge in lunacy, I do not now determine that question. It is a very important one. It has been in doubt, and it will remain in doubt until it is expressly raised in a case which requires decision.

We have arrived at the conclusion that the debtor in the present case can be adjudicated a bankrupt without the concurrence of the court in lunacy. We can find nothing in the bankruptcy or lunacy legislation now in force, or in any decided case, which leads us to the conclusion that a person of unsound mind (whether found lunatic by inquisition or not) cannot be made a bankrupt without the concurrence of the court in lunacy, nor can we discover any principle which should induce us to arrive at that conclusion. With regard to the query of RIGBY, L.J., " How can a lunatic commit an act of bankruptcy ? " we do not doubt that a person of unsound mind is incapable of committing an act of bankruptcy which involves intent on his part, but, in the case which we are considering, this question does not arise, since the act of bankruptcy, even if it can be treated as involving any intent on the part of the debtor, was committed before the debtor came under the jurisdiction of the court in lunacy.

We shall first consider the bankruptcy and lunacy legislation now in force, and shall then refer to certain cases cited in argument. It is conceded by all counsel concerned in this case that there is no express provision in any statute now in force dealing with bankruptcy or with lunacy that a person of unsound mind cannot be adjudicated bankrupt. This fact is not of itself conclusive, but there are certain provisions in the Bankruptcy Act, 1914, and in the Bankruptcy Rules, 1915, which afford some indication that such a person can be adjudicated bankrupt. The Bankruptcy Act, 1914, s. 15 (10), provides as follows :

> Where the debtor is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the court makes him unfit to attend his public examination, the court may make an order dispensing with such examination, or directing that the debtor be examined on such terms, in such manner, and at such place as to the court seems expedient.

Sect. 149 provides, *inter alia*, as follows :

> For all or any of the purposes of this Act . . . a lunatic may act by his committee or *curator bonis*.

Rule 199 (1) provides as follows :

> An application for an order dispensing with the public examination of a debtor or directing that the debtor be examined in some manner or at some place other than is usual, on the ground that the debtor is a lunatic or suffers from mental or physical affliction or disability rendering him unfit to attend a public examination, may be made by the Official Receiver or by any person who has been appointed by any court having jurisdiction so to do to manage the affairs of or represent the debtor, or by any relative or friend of the debtor who may appear to the court to be a proper person to make the application.

Under the heading of " Lunatics," r. 297 (1) provides as follows :

> Where it appears to the court that any debtor or creditor or other person who may be affected by any proceeding under the Act or Rules, is a lunatic not so found by inquisition (hereinafter called the lunatic), the court may appoint such person as

> it may think fit to appear for, represent, or act for, and in the name of the lunatic, either generally, or in and for the purpose of any particular application or proceeding, or the exercise of any particular rights or powers which under the Acts and Rules the lunatic might have exercised if he had been of sound mind. The appointment may be made by the court either on an application made as hereinafter mentioned, or, if the court thinks fit so to do, without any previous application.

Counsel for the appellant points out that these provisions may only be intended to apply to a case in which the debtor becomes a lunatic after the date of the receiving order, or to a case in which a lunatic's committee or quasi-committee had presented a bankruptcy petition with the leave of the court in lunacy. That is true, but there is nothing in the language of these provisions to suggest that they are so limited in their application. It is worthy of note that the Bankruptcy Act, 1861, s. 106, provides as follows:

> If any person being or alleged to be of unsound mind shall be in prison for debt, the gaoler shall forthwith require a justice of the peace for the county or place wherein such prison shall be to visit such debtor, and to inquire into his state of mind; and such justice shall call to his assistance two duly qualified medical practitioners, each of whom shall be a physician, surgeon, or apothecary, and each of whom shall separately examine such debtor; and if such two medical practitioners shall each sign a certificate with respect to such debtor, according to the form in Sched. H to this Act annexed, and such justice shall be satisfied from his own view that such debtor is of unsound mind, he shall certify the same to the proper court, and thereupon the court may appoint some person to represent such debtor, and direct such proceedings to be taken for adjudication in bankruptcy against him as the court shall think fit; and all proceedings under such adjudication shall be had and carried on in the same manner and with the like effect as if such prisoner had been of sound mind, and had presented a petition to the court for adjudication of bankruptcy, or as near thereto as the difference of circumstances will permit.

That section does not appear in the later bankruptcy legislation—no doubt owing to the abolition of imprisonment for debt—but its enactment in 1861 shows that the legislature saw no reason why a lunatic should not be made a bankrupt.

We now turn to the authorities which counsel for the appellant has cited to us, and we are much indebted to counsel for his research into the matter. The first is *Crispe* v. *Perrit* (2), in which case Willes, C.J., said in the course of his judgment, at p. 473:

> . . . an infant or a lunatic cannot be a bankrupt.

No grounds are stated for this opinion, and the question whether a lunatic could be made a bankrupt was not before the court for decision. The next cases which were cited to us were *Ex p. Layton, Ex p. Hardwicke* (3) and *Anon.* (4) The former case contains a *dictum* of Lord Eldon, L.C., at pp. 439, 440, which appears to indicate a view that a commission of bankruptcy would not be appropriate in the case of a lunatic. In the latter case, the report of which is very short and very difficult to follow, Lord Eldon, L.C., is reported as saying [p. 590]:

> . . . a commission of lunacy will not protect the lunatic against an action; and a commission of bankruptcy is a species of action, against which the lunacy cannot be a defence.

This case would appear to be some authority for the proposition that a lunatic could be made a bankrupt in 1807. In *Re Spence, Ex p. Stamp* (5), the facts, as stated in the report, were these:

> There were two *fiat*, a joint *fiat* and a separate *fiat*, in the case, and there were two

petitions, one to annul the separate *fiat* and in favour of the joint *fiat*; and the other a cross-petition to annul the joint *fiat*. On July 28, 1845, Sir George Rose made an order dismissing both petitions. This was a petition of rehearing. It appeared that one of the bankrupts was *non compos mentis*, and that the act of bankruptcy relied upon was the failure to pay or secure a debt according to the Act, 5 & 6 Victoria, chapter 122, sect. 13. Mr. Anderson, in support of the petition to annul the joint *fiat*, contended that a lunatic could not be a bankrupt. Mr. Russell and Mr. Bagshawe, for the assignees and the joint *fiat*, contended that lunatics were liable to the bankrupt laws, not being expressly excluded. Mr. Younge for the petitioning creditor. A witness was examined *viva voce* in court as to the state of mind of the bankrupt.

In that case, SIR JAMES LEWIS KNIGHT BRUCE, C.J., said:

> The evidence makes me doubt the validity of the joint *fiat*. The legislature must have intended service on a person who could give a bond or dispute a debt, which a person fatuous or delirious cannot do. Can such a person commit an act of bankruptcy by omitting to give a bond? I think the validity of the joint *fiat* open to most serious doubts, and that it would be an act of the greatest imprudence to annul the separate *fiat*. I am of opinion that Sir George Rose's order both as to what it did and what it omitted is correct. Dismiss the petition of L. H. Stamp with costs. Consolidate the two *fiats*. Let the estate under each *fiat* be without prejudice to any question as to joint or separate estate administered by the assignees under the separate *fiat*.

It is difficult to see how this case can be reconciled with *Anon.* (4). In *Re Farnham* (1), at p. 802, counsel referred to *Anon.* (4) in argument, and LINDLEY, L.J., observed, at p. 802:

> *Re Spence, Ex p. Stamp* (5) seems to be an authority the other way.

Re James (6) establishes that a lunatic can be made a bankrupt on a petition presented by the committee in the name of the lunatic, but throws no light on the question whether he can be made a bankrupt on a petition presented by a creditor and opposed by the committee or quasi-committee. The decision in *Re Cahen, Ex p. Cahen* (7) does not deal with this question, but BRAMWELL, L.J., observed in the course of the argument [p. 183]:

> An execution above £50 levied by seizure and sale would be an act of bankruptcy, of which the other creditors might take advantage . . .

He referred to the Bankruptcy Act, 1869, ss. 6, 87. In *Re Lee* (8), a creditor took proceedings in the county court at Leeds with a view to making a lunatic (so found by inquisition) a bankrupt. The registrar refused to proceed on the petition. The committee applied to the court in lunacy for directions, and the court directed that the committee should be at liberty to consent to an adjudication in bankruptcy against the lunatic. However, it is impossible to say what would have been the ultimate result of the bankruptcy proceedings if the court had not given this direction, and it appears that the debt on which the bankruptcy proceedings were founded was one incurred by the committee, after his appointment, in carrying on the lunatic's business.

Next in order of date comes *Re Farnham* (1). We have already pointed out that in that case the question which we now have to decide was treated as being an open question. We were referred to *Re Farnham* (9). In that case, the court declined to express any view as to whether the adjudication in bankruptcy could be annulled if an application were made for that purpose. It is to be noted, however, that both LINDLEY, L.J., at p. 840, and KAY, L.J., at p. 843, referred to the fact that in

Farnham's case (1) the act of bankruptcy was committed after Farnham had been found lunatic by inquisition as being a ground on which the adjudication might be annulled. These passages in the judgments may indicate a view that, if the act of bankruptcy had been committed before the inquisition, an application to annul the bankruptcy could not have succeeded. To this extent, *Re Farnham* (9) may lend some support to the view which we have formed. It appears to us that, in the present state of the authorities, and having regard to the observations of the Court of Appeal in *Re Farnham* (1) we are free to form our own view on the question left open in that case, and we have already stated our conclusion on that question.

We must now consider whether there is any reason which should induce the court to refrain from making a receiving order in the present case. Counsel for the appellant pointed out that in the present case the Official Solicitor has been appointed receiver or quasi-committee and has been directed to take possession of all the real and personal property belonging to the patient (the debtor). He suggested that, in those circumstances, if the receiving order stands, there will be a conflict between the trustee in bankruptcy and the quasi-committee appointed in lunacy. He contends further that, if adjudication follows on a receiving order and the title of the trustee in bankruptcy relates back to Jan. 28, 1941, the order of the court in lunacy will become nugatory, because there will be no property of the lunatic to which it can apply. He suggests that it would be extremely inconvenient if such a result were allowed to take place, since any receiver appointed by the court in lunacy could not for some time safely deal with any of the assets of the patient. He could not be sure that the patient had not committed an act of bankruptcy before the order was made in lunacy which might subsequently form the foundation for an adjudication in bankruptcy. In our judgment, there is a short and simple answer to this contention. We do not doubt that, if the receiving order stands, and adjudication follows, the title of the trustee in bankruptcy will relate back to Jan. 28, 1941. In our view, however, the relation back of the trustee's title in no way affects the direction and control of the debtor's property, which has already been assumed by the court in lunacy. The trustee in bankruptcy will stand in the shoes of the debtor as from Jan. 28, 1941; but the title of the trustees to the property belonging to the debtor on Jan. 28, 1941, is no better than the title of the debtor himself. The court in lunacy took away from the debtor and gave to the receiver appointed by it the possession and control of the debtor's property, and that possession and control cannot be ousted by the trustee in bankruptcy so long as the jurisdiction of the court in lunacy continues. If the debtor recovers his faculties and the jurisdiction of the court in lunacy comes to an end, the trustee in bankruptcy will be in a position to administer the property of the lunatic (the legal title to which is vested in him by the provisions of the bankruptcy legislation) for the benefit of the debtor's creditors.

We are not aware of any decision which completely covers this point, but we are assisted in arriving at this conclusion by certain passages in the judgments of the Lords Justices in *Re Farnham* (1). LINDLEY, L.J., said, at p. 807 :

> . . . it has been pointed out, and I think very properly, that inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take subject to the powers of the judge in lunacy conferred by the Lunacy Act, 1890 ; and the Lunacy Act, 1890, by sects. 117 and 120, vests in or confers upon the judge in lunacy various powers, including a power to apply the estate of the lunatic in discharge of his debts . . . I think Mr. Warmington was quite right in saying that, whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him except subject to the jurisdiction which has accrued before the bankruptcy to the judge in lunacy under the inquisition.

In the same case, LOPES, L.J., said, at p. 809 :

> But then it must be recollected that this adjudication in bankruptcy was after the date on which Farnham was found to be a lunatic ; and then the consideration arises whether or not the jurisdiction of the court in lunacy does not take effect. There is no doubt of this, I apprehend, that, subject to what I am about to say, the property of the bankrupt would have vested in the trustee ; but the trustee, in my judgment, took his title subject to the power contained in the Lunacy Act, 1890, s. 117. The title of the trustee was acquired subsequently to the lunacy, and, being acquired subsequently to the lunacy, in my opinion it cannot be enforced in lunacy, in consequence of the Lunacy Act, 1890, s. 117 ; and that being so, this plate is subject to be dealt with by the court according to its discretion.

Later, RIGBY, L.J., said, at p. 811 :

> It appears to me that, without in the least purporting to decide that there can be an adjudication against a lunatic, and that there has been a proper adjudication in this case—assuming that he committed an act of bankruptcy by allowing goods of his to remain in the hands of the sheriff, and that everything has been done in due order—yet that adjudication cannot in any way oust the jurisdiction of the judge in lunacy, or interfere with any principle which has been established in that jurisdiction.

Later again, he said, at p. 812 :

> It is quite plain that the Act intended that the property should come to the trustee, not as the property of the beneficiary under the settlement, but as if the settlement never had existed ; that is to say, it passes as the property of the bankrupt, the lunatic. That being so, I think it is perfectly plain that the jurisdiction of the judge in lunacy over all this property exists and cannot be ousted by an adjudication in bankruptcy, even though properly made.

We do not overlook the fact that in *Re Farnham* (1) the act of bankruptcy occurred after the lunatic had been found lunatic by inquisition and a committee appointed, so that the doctrine of relation back had no application in that case. We think, however, that the observations of the Lords Justices are equally applicable to a case where the act of bankruptcy had been committed before the jurisdiction of the court in lunacy arose, provided that the adjudication in bankruptcy is later in date than the order in lunacy. Apart from the fact that we see no good reason why a receiving order should not be made, there are certain advantages to be gained by taking this course. The trustee in bankruptcy will acquire the legal title at once, and will be able to administer the property as soon as the jurisdiction in lunacy comes to an end. Further, it may well be that investigation by the trustee may reveal that there are assets which he can get in, but which are beyond the reach of the receiver in lunacy. For instance, there may be settlements by the debtor which are void as against the trustee in bankruptcy, and there may be payments by the debtor which can be set aside under the provisions of the bankruptcy law as constituting a fraudulent preference. We do not express any view as to whether or not any assets got in by the trustee in bankruptcy by reason of the provisions of the bankruptcy law, which did not belong to the debtor at the time when the jurisdiction of the court in lunacy arose, are subject to the control of the court in lunacy. That is a question which may never arise. It is sufficient to say that, in our judgment, for the reasons which we have stated, the registrar was right in making a receiving order, and this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *The Official Solicitor* (for the appellant); *Isadore Goldman & Son* (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

JABER ELIAS KOTIA AND ANOTHER *v.* KATR BINT JIRYES NAHAS.

[Privy Council (Lord Atkin, Lord Russell of Killowen, Lord Romer, Sir George Rankin and Clauson, L.J.), **April 30, May 1, July 1, 1941.**]

Privy Council—Palestine—Intestacy—Succession—Lebanese subject owning mulk land situate in Palestine—National law of deceased—Application of the law of the situation of the property—Palestine Order in Council, 1922, *arts.* 46, 51, 58, 59, 64—*Palestine Succession Ordinance*, 1923, *ss.* 2, 3, 4, 11—*Palestine (Amendment) Order in Council*, 1935.

The appellants are the only brothers of the intestate, who died childless, a national of, and domiciled and resident in, the Lebanese state. They claimed that certain mulk land (land possessed in full ownership) situate in Palestine ought to be divided between them and the intestate's widow in proportions in accordance with the Sharia Moslem law prevailing in the Lebanese state. The respondent, the widow, on the contrary, claimed that the land ought to be divided between herself and the two brothers in the proportions adopted in cases of intestacy by the Ottoman law and applicable by virtue of the law of Palestine. The court was asked to decide (i) the law of Palestine as to the devolution on the death of the deceased intestate of this particular piece of land, and (ii) what the Lebanese courts would determine to be the devolution of the land in the circumstances stated:—

Held: (i) the enacted law of Palestine provides that the devolution of the land, in the circumstances stated, is to be such as the courts of the nationality of the deceased—namely, the Lebanese courts—would determine it to be if the question were before them.

(ii) the Lebanese court would determine that the law of Palestine, being the law of the situation, governed the matter.

(iii) where the deceased is neither a Palestinian citizen nor a member of one of the religious communities, his mulk land, whether he be a foreigner or not, is to be distributed in accordance with the national law of the deceased, and, where the national law imports the law of domicil or the law of the situation of the land, the law so imported is to be applied. The national law of the deceased—namely, the Lebanese law—imported the law of the situation of the land. Therefore, the law to be applied was the law of Palestine.

[**EDITORIAL NOTE.** It was argued here that, when the Palestinian law was found to be that the matter was governed by the law of the nationality of the deceased, it was the duty of the court to discover the law which the courts of that nationality would apply to the succession to land belonging to nationals and situate in that country. The Judicial Committee have refused to accept this proposition and state definitely that the duty of the court is to discover the law which the courts of the nationality would apply to the case under consideration, *i.e.*, to the succession to land situated abroad and in the ownership of one of its nationals.

AS TO SUCCESSION TO IMMOVABLES, see HALSBURY, Hailsham Edn., Vol. 6, p. 240, para. 294 ; and FOR CASES, see DIGEST, Vol. 11, p. 362, Nos. 436-439.]

Cases referred to :

(1) *Tsinki* v. *King's Advocate*, [1920] A.C. 743 ; Digest

(2) *Abdullah Bey Chedid* v. *Tenenbaum* (1933), Pal. L.R. 831.

(3) *Casdagli* v. *Casdagli*, [1919] A.C. 145 ; 11 Digest 323, *115* ; 88 L.J.P. 49 ; 120 L.T. 52 ; *revsg.*, [1918] P. 89.

(4) *Re Ross, Ross* v. *Waterfield*, [1930] 1 Ch. 377 ; Digest Supp. ; 99 L.J.Ch. 67 ; 142 L.T. 189.

(5) *Re Askew, Marjoribanks* v. *Askew*, [1930] 2 Ch. 259 ; Digest Supp. ; 99 L.J.Ch. 466 ; 143 L.T. 616.

APPEAL from a judgment of the Supreme Court of Palestine setting aside a judgment of the District Court of Jaffa in favour of the appellants. The facts are fully set out in the judgments of their Lordships delivered by CLAUSON, L.J.

D. N. Pritt, K.C., and *Phineas Quass* for the appellants.

C. T. Le Quesne, K.C., and *Gerald A. Gardiner* for the respondent.

CLAUSON, L.J. : The two appellants in this matter are the only brothers of Ibrahim Elias Kotia, who died intestate and childless on Dec. 7, 1937, a national of, and domiciled and resident in, the Lebanese State. The respondent is the widow of the deceased. The brothers claim that certain *mulk* land (i.e., land possessed in full ownership, see *Tsinki* v. *King's Advocate* (1), at p. 746) of the deceased situate in Palestine ought to be divided in the proportions of nine-twenty-fourths to each brother and six-twenty-fourths to the widow, i.e., in accordance with the Sharia Moslem law prevailng in the Lebanese State. The widow, on the contrary, claims that the land in question ought to be divided in the proportions of one-quarter to each brother and one-half to the widow, proportions adopted in cases of intestacy by the Ottoman law, and, according to the arguments of the widow, applicable to the present case by virtue of the law of Palestine. The District Court of Jaffa on July 31, 1938, ordered the issue of a certificate of succession in relation to the property in question and the movables of the deceased in Palestine in accordance with the contention of the brothers, thus giving one-quarter to the widow. On Oct. 31, 1938, the Supreme Court of Palestine, on appeal from the District Court, directed the order of the District Court to be set aside and an order substituted ordering a certificate of succession to issue, giving (in accordance with the widow's contention) a one-half share in the *mulk* land to the widow and a one-quarter share to each of the two brothers. Although the certificate issued under the order of the District Court extended to movables in Palestine, no question was raised either in the appellate court or before their Lordships in regard to the deceased's movables in Palestine. Before their Lordships the argument was confined to the question of succession to the deceased's immovables in Palestine, and it is this question alone which their Lordships have considered.

The following are the provisions of the law of Palestine which are relevant to the matters in dispute. The Palestine Order in Council, 1922, provides as follows :

> 46. The jurisdiction of the civil courts shall be exercised in conformity with the Ottoman law in force in Palestine on Nov. 1, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such orders in council, ordinances and regulations as are in force in Palestine at the date of the commencement of this order, or may hereafter be applied or enacted ; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before courts of justice and justices of the peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.
>
> 51. Subject to the provisions of arts. 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this part by the courts of the religious communities established and exercising jurisdiction at the date of this order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.
>
> 58. The civil courts shall exercise jurisdiction over foreigners, subject to the following provisions.
>
> 59. For the purpose of this part of the order the expression " foreigner " means any person who is a national or subject of a European or American state or of Japan, but shall not include (i) native inhabitants of a territory protected by or administered under a mandate granted to a European state, (ii) Ottoman subjects, (iii) persons who have lost Ottoman nationality, and have not acquired any other nationality. The term " subject " or " national " shall include corporations constituted under the law of a foreign state, and religious or charitable bodies or institutions wholly or mainly composed of the subjects or citizens of such a state.
>
> 64. (i) Matters of personal status affecting foreigners other than Moslems shall be decided by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner, provided always that the courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an ordinance is passed conferring such jurisdiction. (ii) The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicil, in which case the latter shall be applied. (iii) The District Court, in trying matters of personal status affecting

> foreigners, shall be constituted by the British president sitting alone. In trying matters of personal status affecting foreigners other than British subjects, the president may invite the consul or a representative of the consulate of the foreigner concerned to sit as an assessor for the purpose of advising upon the personal law concerned. In case of an appeal from a judgment in such a case the consul or representative of the consulate of the foreigner concerned shall be entitled to sit as an assessor in the Court of Appeal.

By the Palestine (Amendment) Order in Council, 1935, the following article was substituted for the original art. 59 as from Apr. 1, 1935 :

> For the purposes of this part of the order, the expression " foreigner " means any person who is not a Palestinian citizen. Under powers contained in the order in council, the Succession Ordinance, 1923, was established on Mar. 8, 1923. The material provisions of that ordinance as appearing in the current revised ordinances are as follow :
>
> 2. In this ordinance, unless the context otherwise requires, " foreigner " means any person who is a foreigner within the meaning of the Palestine Order in Council, 1922, art. 59 ; " immovable property " includes *miri* land and *mulk* land ; " *mulk* land " includes all heritable land or interests therein, not being *miri* land ; " the Ottoman law " means the provisional law relating to the succession to immovable property dated 3 Rabi ul Awal, 1331, as set forth in the second schedule to this ordinance.
>
> PART II.—JURISDICTION OF CIVIL COURTS.
>
> 3. (1) The civil courts shall have exclusive jurisdiction in all matters relating to the succession to, . . . every Palestinian citizen and any other person, not being a foreigner. Provided that such citizen or other person was not at the date of his death either a Moslem or a member of one of the religious communities. (2) They shall also have exclusive jurisdiction in all cases in which a dispute arises as to the succession to, or the will of, a foreigner, other than a Moslem.
>
> 4. Subject to the provisions of sect. 21, a civil court shall distribute successions within its jurisdiction according to the following rules : (i) Where the deceased was a member of one of the religious communities and was not a foreigner, the provisions of sect. 11 shall apply. (ii) Where the deceased was a Palestinian citizen and was not a member of one of the religious communities, the provisions of the Ottoman law shall apply, subject to any testamentary disposition made by the deceased. (iii) Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the religious communities, the following rules shall apply : (*a*) *mulk* land and movables of the deceased shall be distributed in accordance with the national law of the deceased . . . (*c*) where the national law imports the law of the domicil or the religious law or the law of the situation of an immovable, the law so imported shall be applied : Provided that, if the national law imports the law of the domicil, and the latter provides no rules applicable to the person concerned, the law to be applied shall be the national law.
>
> 11. In the administration and distribution of the estate of a deceased person who was a member of any of the religious communities and was not a foreigner, the civil courts shall apply the following rules to regulate the distribution of his *mulk* and movable property . . . (*d*) in default of testamentary dispositions, or in so far as such dispositions do not extend, the property shall be distributed in accordance with the provisions of the Ottoman law contained in the second schedule to this ordinance.

The first schedule to the ordinance enumerates the recognised religious communities, one of which is the Eastern (Orthodox) community. The second schedule sets out the Ottoman law relating to the inheritance of immovable property. It is sufficient to state that the effect of it is that, upon the succession to a childless male leaving a widow and two brothers, the widow's share is one-half and each of the brothers takes one-quarter.

The deceased appears to have belonged to the Eastern (Orthodox) religion, but it was not shown that he belonged to the Eastern (Orthodox) community in Palestine. Indeed, the appellants in their case submitted that he plainly did not. Their Lordships feel no doubt that the phrase " Eastern (Orthodox) community" appearing in the first schedule to the Succession Ordinance, 1923, refers to the community in Palestine adhering to the Eastern (Orthodox) Church, and that a person domiciled and resident outside Palestine does not fall within the description of a member of the Eastern (Orthodox) community as used in the ordinance merely because he is in fact an adherent of the Eastern (Orthodox) Church. That this is the correct view of the phrase is implied in the language used by Lord Tomlin in delivering the opinion of their Lordships in *Abdullah Bey Chedid* v. *Tenenbaum* (2), at p. 843.

Before the District Court there was evidence as to the Lebanese law which, in the opinion of the appellate court (from which their Lordships see no reason to differ), showed that, in the case of immovable property situated outside Lebanon, the Lebanese courts would apply the law of the country where the immovable property was situated—that is, in this case, the law of Palestine. In the District Court, the judge held that the law to be applied to the succession not only to the movables but also to the immovables in question—namely, *mulk* land situated in Palestine—was the national law of the deceased, i.e., the Lebanese law. He treated the evidence as establishing that the national law in Lebanon is Moslem Sharia law, and he accordingly ordered a certificate of succession to issue giving 6 shares to the widow and 9 shares to each of the brothers. In arriving at this decision, the judge appears (as pointed out by the Court of Appeal) to have ignored the evidence. It was argued at one time before their Lordships by counsel for the appellants that they ought to have a further opportunity of questioning this evidence, but it does not appear that any application for leave to tender further evidence was made either to the district judge or to the appellate court, and their Lordships must accordingly deal with the evidence as it stands.

Before the appellate court, and again before their Lordships, it was argued that, for the purposes of the application of the Succession Ordinance, the deceased must not be treated as a foreigner. It was suggested that he was excluded from the definition of foreigner in the Order in Council, 1922, art. 59, since he was, it was said, a native inhabitant of a territory—namely, Lebanon—administered under a mandate granted to a European state. Whether or not this might have been so had the order in council remained in its original form, their Lordships see no reason to differ from the view of the appellate court that, since the amending order in council of 1935 came into force, the term "foreigner" in the Succession Ordinance, 1923, must be read with reference to the new art. 59 substituted for the former art. 59 by the amending order in council. This question is, however, of no importance in view of the fact that the deceased was not, and was not suggested by either side to be, a Palestinian citizen. The effect of sect. 4 (iii) of the ordinance is that, where (as in the present case) the deceased was neither a Palestinian citizen nor a member of one of the religious communities, his *mulk* land, whether he be a foreigner or not, is to be distributed in accordance with the national law of the deceased, and, where the national law imports the law of the domicil or the law of the situation of the land, the law so imported is to be applied. On the evidence, the appellate court, in their Lordships' opinion, rightly held that the national law of the deceased (i.e., the Lebanese law) imported the law of the situation of the land. The appellate court stated the result to be that the law applicable is the law of Palestine, and added that, in accordance with that law, it is not disputed that the widow is entitled to a half-share.

Their Lordships agree in the conclusion thus reached by the appellate court, but, in view of the fact that counsel for the appellants in fact disputed before their Lordships that, in this particular case, the law of Palestine was the Ottoman law, which admittedly would give the widow a half-share, it is desirable to explore the matter somewhat further. It was argued, and it is true, that the law of intestate succession to *mulk* land in Palestine is not uniform. The distribution is governed, in the case of *mulk* land owned by a Palestinian citizen who is not a member of one of the religious communities specified in the Ordinance, by Ottoman law, by virtue of sect. 4 (ii) of the ordinance. It is governed, in the case of *mulk* land owned by a member of one of the religious communities who is not a foreigner, by Ottoman law, by virtue of sect. 11 (*d*) of the ordinance. It is governed in the case of *mulk* land owned by a deceased person who is neither a Palestinian citizen nor a member of one of the communities by the national law of the deceased. It was then argued that the only reasonable construction to be placed upon the phrase "the national law of the deceased" in sect. 4 (iii) (*a*) of the ordinance is "the law which the courts of the nationality of the deceased would apply to the intestate succession to land of their own nationals in their own country"—namely, in the present case, the Sharia law, which would give the widow only a quarter-share—and that, unless this construction is placed upon the ordinance, there results a *circulus inextricabilis*, the Lebanese law referring the matter back to the local law, the local law referring the matter back to the law of nationality, and so on *ad infinitum*.

Their Lordships would hesitate long before construing the words "the national law of the deceased" as meaning "the law which the courts of the nationality of the deceased would apply to the intestate succession to land belonging to their own nationals situate in their own country." Such a construction would construe the ordinance as deliberately cutting across the principle recognised by SCRUTTON, L.J., in *Casdagli* v. *Casdagli* (3), at p. 106 (a dissenting judgment, which was, however, approved by the House of Lords upon appeal, at p. 151), by LUXMOORE, J., in *Re Ross, Ross* v. *Waterfield* (4), and by MAUGHAM, J., in *Re Askew, Marjoribanks* v. *Askew* (5), which their Lordships venture to state as follows. In the English courts, phrases which refer to the national law of a *propositus* are *prima facie* to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what, in their view, is his domicil (if they consider that to be relevant), and having regard to the situation of the property in question (if they consider that to be relevant). Their Lordships accordingly approach the question of the construction of sect. 4 of the ordinance on the footing that this view of the *prima facie* meaning of the phrase "the national law of the deceased" is (as, in their Lordships' opinion, it is) the correct one. On examining the whole of the section, their Lordships, far from finding grounds for modifying their *prima facie* view, find confirmation of it in the wording of sect. 4 (iii) (*c*), which clearly contemplates that the national law to which reference is made may import the law of the domicil or the law of the situation of an immovable. If the phrase "the national law of the deceased" is to be construed (contrary to their Lordships' view) to mean "the law which the courts of the deceased's nation would apply in the case of its own national domiciled in its own country in relation to land in its own country," it is not easy to account for the reference to the possible importation of the law of the domicil or the law of the situation of an immovable.

As regards the suggestion made by counsel for the appellants that it was an objection to the construction of the section which their Lordships prefer that it would result in a *circulus inextricabilis*, their Lordships feel no difficulty. It must be borne in mind that the primary question for their Lordships is: "What is the law of Palestine as to the devolution on the death of the deceased intestate of this particular piece of land?" To this, as their Lordships have pointed out above, the answer is that the enacted law of Palestine provides, on its true construction, that the devolution of this particular piece of land, in the circumstances stated, is to be such as the courts of the nationality of the deceased—namely, the Lebanese courts—would determine it to be if this question were before them. (It may be observed that in the present case there is no question of the presence in the Lebanese law of any provision of a character which the Palestinian court might properly consider itself precluded from applying. Examples of such possible provisions are given by MAUGHAM, J., in *Re Askew, Marjoribanks* v. *Askew* (5), at p. 275, but need not be considered for the purposes of the present case). The second question is one of fact—namely, what would the Lebanese court determine to be the devolution of this particular piece of land in the circumstances stated? The evidence shows that the Lebanese court would determine that the Palestine law, being the law of the situation, governs the matter. In other words, the law of Palestine, as applied to this particular case, is found to be that, although the deceased is a national of the Lebanese state, there is nothing in the law of the Lebanese state to interfere with the application to the case of the law of Palestine, being the law of the situation of the property in question. The Palestine court must (in accordance with the views expressed by SCRUTTON, L.J., in *Casdagli* v. *Casdagli* (3)) be taken to accept the renvoi, and apply its own law, as applicable to the case of a Palestinian citizen, which, whether the case falls within subsect. (i) or subsect. (ii) of the Succession Ordinance, 1923, s. 4 (and it must fall within one or the other), provides for the application of the provisions of the Ottoman law.

One further point remains. It was urged by counsel for the appellants A that there cannot be said to be any law of the situation of the property. It was said that the Succession Ordinance, 1923, provides such a law for *mulk* land belonging to a member of one of the specified religious communities, and for like land belonging to a Palestinian citizen, but that, as regards land belonging to any one else, whether a foreigner or, not being a foreigner B a person who is neither a Palestinian citizen nor a member of one of the specified religious communities, there is only the law enacted by sect. 4 (iii), and that the words " the law of the situation " of an immovable, as used in that subsection, cannot be construed as repeating the section, but must refer either to something else or to something which does not C exist. In view of the opinion expressed above, it follows that the alleged gap does not exist, but, in any event, it appears to their Lordships, as at present advised, but without deciding the point, that any gap as is alleged would be filled by the operation of the Palestine Order in Council, 1922, art. 46. In the result, their Lordships are of opinion that the decision under D appeal correctly ordered a certificate of succession to be issued giving to the widow of the deceased 12 shares out of 24 in the *mulk* property in Jaffa. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants will be ordered to pay the respondent's costs of the appeal.

E *Appeal dismissed with costs.*

Solicitors: *T. L. Wilson & Co.* (for the appellants); *Reid Sharman & Co.* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

SLATER *v.* WORTHINGTON'S CASH STORES (1930), LTD.

[Court of Appeal (Scott and Goddard, L.JJ., and Stable, J.), **April 30, 1941.**]

Highways—Nuisance—Fall of snow from building—Act of God.

Nuisance—Building adjoining highway—Fall of snow from roof—Act of God.

During Jan., 1940, extraordinarily severe snowstorms, reaching their peak on Jan. 29, had caused snow and ice to accumulate on the roof of the defendants' leasehold premises in Leicester. No steps were taken to remove this snow or to warn the public of its presence; but it was proved that the roof was inspected on the day of the accident a short time before the snow fell. On Feb. 2, the plaintiff was standing on the highway outside these premises when she was injured by a fall of snow from the roof. She claimed damages, alleging nuisance, or, alternatively, negligence. The defendants denied these allegations, and pleaded in defence that these severe snowstorms were an act of God:—

Held: this accumulation of snow constituted a nuisance, of which, in view of the severity of the storms, the defendants must be deemed to have had knowledge. Since a period of four days had elapsed during which this could have been abated, and nothing was done, the defendants were liable both in nuisance and in negligence.

[**EDITORIAL NOTE.** From a practical point of view, the case here under appeal decided a point which does not appear to have arisen before, and it is now clear that the law places a duty on the occupier of property to abate within a reasonable time any danger due to a fall of snow. The case has a deeper interest to those interested in the theory of the law. Cases on the continuance of a nuisance are few, and for some time were governed by the decision of the Court of Appeal in *Job Edwards, Ltd.* v. *Birmingham Navigations* (1) that one was not liable for a nuisance on one's land due to the act of a stranger. This view was overruled in the House of Lords in the *Sedleigh-Denfield* case (2), and the true view is that, where there has been an opportunity to abate the nuisance, the occupier is liable if he has failed to abate it. In the present case, however, the nuisance was not due to the act of a stranger but to natural causes. The same principle is applied, and the occupier is liable if it is proved that he knew, or ought to have known, of the nuisance and failed to abate it.

As to Continuing a Nuisance, see HALSBURY, Hailsham Edn., Vol. 24, pp. 84, 85, para. 148; and for Cases, see DIGEST, Vol. 36, p. 214, Nos. 567-575.]

Cases referred to:

(1) *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341; 36 Digest 214, *575*; 93 L.J.K.B. 261; 130 L.T. 522.

(2) *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*), [1940] A.C. 880; [1940] 3 All E.R. 349; Digest Supp.

(3) *Saxby* v. *Manchester & Sheffield Ry. Co.* (1869), L.R. 4 C.P. 198; 36 Digest 214, *572*; 38 L.J.C.P. 153; 19 L.T. 640.

Appeal by the defendants from a judgment of Oliver, J., sitting without a jury at the Leicester Autumn Assizes,, dated Jan. 24, 1941 and reported [1941] 1 All E.R. 245. The facts are fully set out in the judgment of Scott, L.J.

N. L. C. Macaskie, K..C, and *Arthur S. Ward* for the appellants.

J. P. Stimson for the respondent.

Macaskie, K.C.: An occupier of premises on which a nuisance exists is not liable for injuries caused unless he has notice of the existence of the nuisance and takes no reasonable steps to abate it. There was no evidence to justify the judge in finding that the defendants knew of the existence of any danger. There was no evidence that they had not taken steps to abate it. The only evidence of the defendants' knowledge was the admission in answer to interrogatories that on the day of the accident they had had the roof inspected.

SCOTT, L.J.: This case, which arose out of a great snowstorm at the end of Jan., 1940, raises the question whether the occupier of a shop on the roof of which snow has accumulated in large quantities is liable for personal injuries caused to a person standing outside the shop on the public footpath below, upon whom the snow falls so as to cause her grave hurt. The plaintiff claimed damages for nuisance, or, in the alternative, for negligence. On Feb. 2, 1940, the plaintiff was walking through the public streets of Leicester with her mother, and stopped outside the shop of the defendant company at No. 23, North Gate Street, while her mother went into the shop. The plaintiff was waiting for her mother to come out. While she was standing there, an hour or so after midday, a mass of snow, which had accumulated on the roof as the result of the snowstorm, fell upon her, bringing down three 6ft. lengths of rainwater guttering. The judge thought that the iron gutters did not in fact strike the plaintiff, because, in his opinion, she would have been killed if they had. However, the mass of snow caused her serious injuries, in respect of which the judge held that the defendant company were liable and awarded her damages to the extent of over £600. There is no appeal on the amount of the damages. The defendants appeal on liability, submitting that there was no evidence of actionable negligence against them, and, further, that the presence of the snow on the roof, in the circumstances, did not cause a nuisance. The judge decided in the plaintiff's favour, and held that she was entitled to damages. On appeal, it is submitted that there was no evidence either of negligence or of actionable nuisance, and it is that submission with which we have to deal.

The other material facts can be stated fairly shortly. The building abuts upon the pavement, as shops often do. The facade was 32ft. 8ins. high to the gutter. At the gutter, the roof sloped upwards at an angle of about 30°. It is common ground that between Jan. 26, 1940, and Jan. 29, 1940, there was a blizzard, during which snow fell to an average depth on the roof of probably slightly over 18ins. I say slightly over, because the evidence was that on Feb. 2, 1940, when the accident happened, the snow proved on examination to be then of an average depth of 18ins. Between Jan. 29, 1940, and Feb. 2, 1940, there had been an alternation of slight thaws and drizzle and slight falls of snow, so that it is clear that something like 18ins. of snow had been lying upon the roof from Jan. 29, 1940, until the time of the accident.

The defendants called no evidence as to any inspection of the roof, nor did they call anybody who really knew anything about the position of the snow on the roof or the danger to persons on the highway, so as to enable the judge to deal with it from that point of view, but interrogatories were administered to the defendants and answered by their secretary, containing, *inter alia*, an admission that on Feb. 2, 1940, before the accident took place, the defendants did inspect the roof. In consequence of the arguments of counsel for the appellants before us, A I was led to think that perhaps he was suggesting that the answers to interrogatories as they appear before us were due partly to some clerical or other slip or mistake, and I asked him whether the words "before the accident" should be read as having been intended to be "after the accident." I gathered that, after consultation with his junior, B he thought that that was probably the case. We, of course, have consulted Oliver, J., on the matter, however, and he tells us that there was no suggestion whatever at the trial that those answers to interrogatories were not the answers intended by the company when their secretary swore them. That being so, we have to take it that C knowledge of the character of the fall of snow on the roof was quite definitely brought home by inspection to the defendant company before the accident.

What happened was—and this comes partly from the examination after the accident—that, in the course of time (we do not know when, D but before the accident, or thereabouts), the snow had gradually slipped down from the ridge of the roof so that for 4ft. or 5ft. downwards the slates were exposed. How short a time that was before the accident, and how far it was contributed to by the slipping of the snow which took place at the moment of the accident, we cannot know, but it is E quite plain that the defendants had quite sufficient knowledge of the position for us to impute to them knowledge of the danger resulting to passers-by from the presence of the snow there. That danger lay partly in the fact that the gutter projected over the pathway for 18ins. from the vertical wall of the house, so that any sliding movement would F start at a point vertically 18ins. over the edge of the pavement. Any movement due to the sliding would tend to project this snow further out on to the pathway than 18ins., but it could not fall less than 18ins. from the wall of the house. In those circumstances, the judge held that the defendants were clearly liable, because they had such knowledge G as put on them the duty of taking steps either to abate the nuisance or to prevent people from passing by within reach of the potential fall of snow. It is said that to take effective steps to remove the snow from the roof would have taken them a long time. That may well be, but, as Goddard, L.J., put it during the argument, five minutes would have enabled them H to put up a notice warning foot-passengers that they must keep away from the front of the shop.

We have had some argument that, on those facts, there are decisions in the courts, or at least *obiter dicta*, indicating that, as the defendants did not create the nuisance, which fell from heaven, therefore, they are free from liability. However, the answer is that whether one looks upon it as a question of abating the nuisance on account of the danger to the public on the highway or of doing nothing, so that it continues as a nuisance, is wholly immaterial, as liability must attach to the defendants for allowing that body of snow to lie where it was, in a position whence it might fall upon passers-by, who would not expect anything to fall upon their heads from above. It does not matter in the least, in my view, whether one calls it an action in nuisance or an action in negligence. On both grounds, in my view, the defendants are liable.

We have had certain cases cited to us, but, beyond referring to the cases cited, I do not think it necessary to dwell upon the authorities, because it seems to me a perfectly plain case. One case was *Job Edwards, Ltd.* v. *Birmingham Navigations* (1). That happened to be a question of fire. Counsel relied to some extent upon the judgment of SCRUTTON, L.J., which contained reasons which led him to dissent, but the whole question of liability in such a case as this was settled by the House of Lords in *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*) (2). That was an appeal from the Court of Appeal, in which the House of Lords allowed the appeal. LORD WRIGHT there pointed out, at p. 902 ([1940] 3 All E.R., at p. 363)—which is quite true—that we had felt in the Court of Appeal that we were obliged to reach the decisions which we did by reason of previous decisions binding upon us—namely, *Job Edwards, Ltd.* v. *Birmingham Navigations* (1) and *Saxby* v. *Manchester & Sheffield Ry. Co.* (3). I do not think that it is necessary to discuss the cases any further. The appeal must be dismissed with costs.

GODDARD, L.J.: I agree, and, like SCOTT, L.J., I find that this is a reasonably clear case. Like every other case, it depends on its own particular facts, and I do not want it to be thought that in this case we are deciding anything so unreasonable as that, where there is a heavy fall of snow, whether it lasts hours or days, there is a duty upon the occupier of a house to go out at intervals and clear the snow off his roof lest some should fall upon passers-by, nor, of course, can it be done within five minutes or so of the snowfall ceasing. In this case, however, the facts are that there had been an exceptional blizzard lasting for some days. To everyone's knowledge that led to an accumulation of snow on the roofs to the very considerable depth of 18ins. The roof in question was one which overhung the street. The face of the house was flush with the roadway, and it was obvious, therefore, that, if the snow slid at all, it would be projected straight into the street, and, if there was a breaking of the gutter—and I think that one may really take judicial notice of the fact that gutters do break under the weight of accumulations of snow on a house, because after every considerable snowstorm one can see broken gutters about—that gutter would fall into the street, more vertically perhaps than the snow would shoot, and either of those would be real potential sources of danger to passers-by. Whatever happened or did not happen on Feb. 2, the day of the accident, four days elapsed between the cessation of this blizzard and the happening of the accident. The defendants must be taken to have known that there was a large accumulation of snow on their roof. It was a sloping roof and, as I have said, snow falling from it would discharge itself on to the footpath. Therefore, they knew that there was a potential source of danger for four days and did nothing.

More than that, on the evidence before us, on Feb. 2, before the accident, they actually had an inspection of this roof. They must then have seen the condition of things, and they took no steps because they did not consider them necessary. No one was called to say why they did not consider them necessary—*e.g.*, that for various reasons it was considered safe, or that it was not possible to remove it. There was no explanation of the fact that they did not put up a notice. For four days the defendants knew that there was this potential source of danger on the roof, and on the third day they inspected it, and so could have seen the precise state of affairs.

I think that, in those circumstances, while it may be to some extent a hardship that, at the moment when this fall took place, there happened to be somebody standing looking into the shop window immediately underneath where the gutter broke, I can see no answer to the case, whether it is put in negligence or in nuisance, and I respectfully agree with Scott, L.J., that there is no defence at all. I think none of the cases cited has any bearing on the matter at all. It has been settled by the House of Lords that the opinion which previously existed owing to the decision of this court in *Job Edwards, Ltd.* v. *Birmingham Navigations* (1)—that a person was not liable for nuisance on his land which he did not create—was wrong. There was ample evidence here on which the judge could find that this accumulation of snow did amount to a nuisance, and that it was continued on the defendants' premises with their knowledge.

Stable, J.: I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors: *Nash, Field & Co.*, agents for *Blewitt & Co.*, Birmingham (for the appellants); *H. W. Clarkson. Wright & Co.*, agents for *Herbert Simpson, Son & Bennett,* Leicester (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

R. *v.* BARKER.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., and Tucker and Asquith, JJ.), **July 4, 8, 1941.**]

Criminal Law—Evidence—Confession—Inducement—Discovery as result of confession—Production of documents by taxpayer to Inland Revenue.

In the course of investigations by the Inland Revenue, the appellant, an accountant, produced certain documents as a result of there being read to him an extract from HANSARD'S PARLIAMENTARY DEBATES, which states that : " Where the taxpayer takes the initiative and voluntarily discloses the fact of his past frauds and their full extent and is also prepared to facilitate investigation . . . the board will not institute criminal proceedings, but will accept a pecuniary settlement." Subsequently, criminal proceedings were taken against the taxpayer and the appellant for conspiracy to defraud the Inland Revenue :—

HELD : the documents which were produced as a result of reading this extract could not subsequently be used in evidence against the appellant. Although the statement in HANSARD only referred to the taxpayer, it was clear, on the facts of this case, that the inducement was held out to the accountant as well as the taxpayer.

[**EDITORIAL NOTE.** A confession induced by any promise of favour or advantage by a person in authority is inadmissible in evidence, but a discovery which is made in consequence of such of a confession is admissible. The point at issue here is whether the evidence admitted was a such discovery in consequence of a confession or part and parcel of the confession itself. The court has held that the documents were produced in consequence of the promise held out and were, therefore, on the same footing as an oral confession made in consequence of such a promise and were not admissible.

AS TO CONFESSIONS BY ACCUSED, see HALSBURY, Hailsham Edn., Vol. 9, pp. 203-210, paras. 291-297 ; and FOR CASES, see DIGEST, Vol. 14, p. 427, Nos. 4515-4524.]

Case referred to :

(1) *R.* v. *Cason* (1935), 14 Ann. Tax Cas. 471.

APPEAL by the prisoner from a conviction at the Central Criminal Court on May 1, 1941. The facts are fully set out in the judgment of the court delivered by TUCKER, J.

H. J. Astell Burt and *C. Lewis Hauser* for the appellant.

L. A. Byrne for the Crown.

TUCKER, J. [delivering the judgment of the court] : This is an appeal by William Charles Barker, who was convicted at the Central Criminal Court on May 1, 1941, under an indictment which charged him in the first count together with Herbert Joseph Robinson with having conspired to cheat and defraud His Majesty the King and the Inland Revenue Commissioners of divers sums of money then lawfully due for income tax, super tax and sur-tax, and there were a number of other counts in the indictment charging these two men with having prepared and delivered a false statement of accounts for the purposes of the Inland Revenue with intent to defraud. The appellant and the other defendant were found guilty on the count of conspiracy and all the other counts except the last two, which concerned Robinson only, were withdrawn from the jury. Barker now appeals to this court against his conviction, on the ground that certain books and documents were admitted in evidence which were inadmissible. The case for the prosecution was founded upon frauds which were alleged to have taken place over a number of years in connection with the returns of the defendant Robinson in connection with his personal affairs and in connection with a business which he carried on and subsequently turned into a limited liability company. The appellant Barker was a chartered accountant employed by Robinson in making these returns. The matter came to a head in 1937, when a letter was written in October to the defendant, the result of which was that the commissioners made an order for the production of books and documents by Robinson. Additional assessments had been made on him in respect of the years in question, and he had appealed, and this order for the production of the books was made. After that, a letter was written on Dec. 9 by the appellant Barker in which he enclosed certain schedules, which showed that there had been irregularities or a failure to disclose over a number of years a sum amounting to some £7,000-odd. Thereafter, an interview took place on Dec. 31, 1937, at which there were present two representatives of the Inland Revenue making investigations and the appellant Barker and Robinson. At that interview, there was read in the presence of Barker and Robinson, and there was, according to the evidence, handed to both of them, a document which is an extract from certain questions and answers in Parliament which appears in HANSARD'S PARLIAMENTARY DEBATES of July 19, 1923. I need not read the whole of it, but the material part of it dealing with the procedure in cases of this kind which was brought to the notice of Robinson and Barker was as follows:

> The question of fraud and evasion in connection with direct taxation is, of course, a matter of great importance to the Exchequer, but it is not desired that fraudulent taxpayers should be deterred by the fear of criminal proceedings from making spontaneous disclosure of their misdeeds and appropriate pecuniary restitution. I will circulate with the official report a statement of the practice which is followed by the Board of Inland Revenue in the matter. The following is the statement referred to: "Where the taxpayer takes the initiative and voluntarily discloses the fact of his past frauds and their full extent and is also prepared to facilitate investigation and to furnish full evidence (including not only the business books and records, but also private bank books) as may be required on behalf of the board as to the amount of the correct liability, the board will not institute criminal proceedings, but will accept a pecuniary settlement. Cases not infrequently arise in which the disclosure, though in a sense voluntary, is not made on the initiative of the taxpayer. For example, the taxpayer may have been requested to furnish accounts, or further particulars in connection with accounts already rendered, or the production of books may have been suggested. If, in such a case, the taxpayer forthwith comes forward with a full and frank disclosure of past frauds, this would be accepted by the board as equivalent to a voluntary disclosure to the extent that the board would not institute criminal proceedings but would accept a pecuniary settlement."

I need not read the remaining paragraph. That is the vital part of the statement for the purposes of this case.

That having been read and put into the hands of both Barker and Robinson, they then produced to the Inland Revenue inspectors two

ledgers, which, according to the evidence, which is not disputed, had been fraudulently brought into existence for the purpose of misleading the Inland Revenue authorities into thinking that the total amount of these irregularities amounted to some £7,000. It was subsequently ascertained
A that the total omissions or irregularities over the years in question amounted to at least £10,400. These ledgers were produced at this interview and conversations took place. Thereafter, the authorities not being satisfied with the material which they then had, another interview took place on Feb. 22, and, as the result of that interview, two
B further ledgers were produced, and there was also produced by the appellant Barker his own private personal papers—working-papers as they are called in his case—which he had used in the course of the preparation of Robinson's returns and of the returns of Robinson's company. Those were produced some time after Feb. 22, and an
C examination of those documents showed that the first two ledgers were incomplete. It also showed that they had been brought into existence for the express purpose of misleading the Inland Revenue. This court is satisfied that the full nature of the fraud perpetrated by Robinson became apparent upon an examination of these
D further documents. At the trial, Barker was not represented, but, in the course of conducting his own defence, he quite clearly raised the question of the admissibility of any documents which had been produced by himself or Robinson after the interview of Dec. 31, 1937, when this promise or threat had been held out to him. Robinson,
E on the other hand, was defended by counsel, and, in the course of his cross-examination, Robinson's counsel caused to be given in evidence certain other documents, letters and certificates which had been written later by Barker, and which the prosecution, but for such cross-examination, had not sought to put in evidence. To complete the history of
F the matter before the trial, I should have stated that on Mar. 21 another interview took place between the Inland Revenue officials and Robinson and Barker at which this Hansard extract was again read to them, and they were again given further opportunity to make further disclosure. The Inland Revenue authorities' contention was that, despite that
G further opportunity, Robinson and Barker had not even then made full disclosure, because there were two building society accounts which had not been disclosed. At any rate, as a result of that interview on Mar. 21, a letter was written on Apr. 2 which made it clear that the full amount of the irregularities amounted to some £10,400.

H I have indicated the course taken at the trial and the objection which was taken to these documents by Barker. He was invited by the judge, after he had adumbrated it to one of the witnesses, to go into it more fully at a later stage. When he did go into it more fully and after the judge had asked counsel for the prosecution to assist him on the matter, the judge decided that these documents which had been put in had been properly received in evidence. Counsel for the appellant takes two objections, or, rather, he divides his objection to the admissibility of those documents under two different headings. He objects to the admissibility against Barker of the documents which came into existence as the result of the cross-examination by Robinson, and he complains that the judge did not direct the jury that those documents should not be considered A as evidence against Barker. The court does not think that this proposition is one which can be maintained. This evidence, it is true, was let in by counsel for the other defendant, but, having been let in, it was evidence against Barker, and the jury could not be directed that they should not consider it as evidence against Barker. B

With regard to the other submission, that raises questions of some difficulty and importance. Counsel for the appellant has referred the court to a case in which a ruling was given by Sir Gerald Dodson, when he was sitting at the Central Criminal Court in his capacity of commissioner in *R.* v. *Cason* (1), in which he ruled that a document C which had been brought into existence as the result of the reading to the defendant of this Hansard extract was not admissible in evidence, on the ground that it was a confession or a statement which had been made as the result of an inducement contained in the Hansard extract. In this case, counsel for the Crown says D that at any rate the documents (the ledgers and working papers) in the present case should be distinguished from the document which His Honour Judge Dodson decided was not admissible in evidence, because, says counsel, those documents were not documents which were brought into existence as the result of a promise or threat, if there be a E promise or threat, in this Hansard extract, but that they were documents which had at all times been in existence, that the first two ledgers had been brought into existence for the purpose of the fraud, that the two further ledgers had always been in existence, and that Barker's working papers had also always been in existence, and were part and parcel of F the method whereby the fraud had been committed. He contended that they could be given in evidence apart altogether from any confession or statement made by Barker or Robinson as the result of this Hansard extract. He cited a passage setting out what he submitted was the law on this matter as summarised in Archbold's Criminal Pleading, G Evidence and Practice, 1938, p. 402:

> Although a confession for the above or any other reasons may not be receivable in evidence, yet any discovery that takes place in consequence of such confession, or any act done by the defendant, if it is confirmed by the finding of the property, will be admitted.

The court accepts that statement as undoubtedly setting out the law, H and it does not desire to question for one moment the fact that there may be cases in which evidence may be given with regard to facts or matters the existence of which may have come to the knowledge of the police as the result of some inadmissible confession. In this particular case, however, having regard to the nature of the Hansard extract and the precise words used, the court is of opinion that the promise expressly relates to the production of business books and records, and that, if, as a result of the inducement or threat, which is contained and is implicit in this Hansard extract, such books and documents are in fact produced by the person or persons to whom such inducement or promise is held out, such documents so produced stand on precisely the same footing as any oral or written confession which may be brought into existence as the result of such promise. The result is that the court is of opinion that these very vital documents and books—namely, the first two ledgers and the working-papers of the appellant Barker—were wrongly admitted in evidence, and, in those circumstances, the conviction cannot stand.

I should add only one further observation, and that is this. The court has not lost sight of the fact that the Hansard extract in terms refers to the taxpayer, and not to the accountant, but, having regard to all the circumstances of this case, and to what took place on Dec. 31, 1937, the court has no doubt that the promise contained in the document was intended to apply, and was held out to Barker just as much as to Robinson. Accordingly, the court is of opinion that this conviction must be quashed.

Appeal allowed.

Solicitors : *J. H. Milner & Son* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

R. *v.* PRINCE.

[Court of Criminal Appeal (Viscount Caldecote, L.C.J., Tucker and Asquith, JJ.), **July 28, 1941.**]

Criminal Law—Murder—Provocation—Direction to jury—Prisoner's evidence not accepted—Right of jury to acquit in case of reasonable doubt.

On a trial for murder, the jury should be directed that, if, upon a review of all the evidence they are left in reasonable doubt as to whether, even if the prisoner's explanation is not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

[**EDITORIAL NOTE.** A defence of provocation may reduce a charge of murder to manslaughter, but, since the decision of the House of Lords in *Woolmington's* case (1), it is necessary that the jury should be directed that they may, even if they reject the story of the prisoner, yet find on all the evidence that the act was unintentional or provoked. They may come to this conclusion upon a consideration of all the circumstances or upon the evidence adduced by the prosecution, although they disbelieve the story told by the prisoner in the witness-box.

As to Manslaughter, see HALSBURY, Hailsham Edn., Vol. 9, pp. 438, 439 paras. 752, 753 ; and for Cases, see DIGEST, Vol. 15, pp. 776-782, Nos. 8305-8384.]

Case referred to :

(1) *Woolmington* v. *Public Prosecutions Director*, [1935] A.C. 462 ; Digest Supp. ; 104 L.J.K.B. 433 ; 153 L.T. 232 ; 25 Cr. App. Rep. 72.

Appeal by the prisoner from a conviction before Oliver, J., at Derby Assizes dated June 21, 1941. The facts are fully set out in the judgment of the court delivered by Viscount Caldecote, L.C.J. A

F. Lee for the appellant.

Constantine Gallop for the Crown.

Viscount Caldecote, L.C.J. [delivering the judgment of the court] : B The appellant in this case was convicted at Derby Assizes on June 21, 1940, before Oliver, J., of the murder of a man named Bown. The appellant is a miner, 32 years of age, and on Mar. 30, which was the day on which the death of Bown took place, he had been out of work for some weeks, and was in debt. Bown, an older man, was in the service of a firm of C retailers at Chesterfield as a caretaker. He was accustomed to sleep in a corner of the premises where it happened that some of the fire-watchers' equipment was kept. There were three firemen's axes there, and also some beds.

On Sunday, Mar. 30, Bown was in a public-house, the Phoenix, about D 1.30 p.m. While he was there, or, at any rate, during part of that time, the appellant was also there. Bown showed some notes which were in his possession to the wife of the licensee of the Phoenix, and, after a little time, he went to his post. The appellant either joined Bown or Bown joined the appellant—it does not matter which—and both of them went to the E premises where Bown was the caretaker. While they were in the premises, Eyre, one of the members of the firm, having been let into the house by Bown, went to some fire-spotting practice on the roof. When he came down later on, he called for Bown to let him out, but, there was no reply, and very soon afterwards Bown's body was found. He had been F killed obviously by a number of blows, which were described at the trial in detail. There were at least four of them which, according to the medical evidence, would have been fatal, and they had been caused by some such weapon as one of the fireman's axes. Bown had been struck from behind as well as from in front with the blade of the weapon. He had G been struck with the spike of the axe, which had been driven into each side of his head just before he died, and there were at least ten severe wounds, including the four any one of which would have caused his death.

Inquiries were made, and a statement was taken from the appellant. H The statement contained a number of allegations as to his movements on that Sunday afternoon, all of which were admitted at the trial to have been false. In the course of that statement, the appellant said that he had seen Bown some time about 2 p.m. and that they parted later, and he did not see Bown, he said, after 2.10 p.m. That statement was not regarded as a satisfactory one, and subsequently the appellant made a statement in the matter about which he had been previously asked to make a statement. He wrote it out in his own words, and there, for the first time, he said that Bown had made an indecent suggestion to him as he was sitting on one of the beds, and that he himself saw red. He said that he grabbed the axe, which was near, to hit Bown, that he lost all reason, and started as if he was in a New York den, and, when he realised what he had done, he tried to cover it up. He then said that, to make it look like a robbery, he took money which was in Bown's pocket, contained in a purse, and he makes some further statement as to the way in which he disposed of the axe and an electric torch.

When he came to be tried for this offence at the assizes, he gave evidence, and his story then contained statements which were in neither of his previous statements. He mentioned an incident in one of the lavatories in Eyre's premises which was in the same category as that which he said had taken place on one of the beds. He said that Bown acted indecently and that that enraged him and he knocked Bown's hand away. He said that they went back together to the fire-watchers' quarters, and Bown made some indecent suggestions, as a result of which the appellant picked up the axe and said that, if Bown did not behave himself, he would bash him. Bown, according to the appellant's story, persisted in his indecent suggestions, and then, according to the evidence which the appellant was giving, the appellant called Bown a dirty beast and knocked him back on the bed with his fist. Bown hit him a glancing blow with the axe, just grazing his eyebrow, and after that the appellant said that he did not know what happened until he saw Bown bleeding on the bed, after which he proceeded to take Bown's purse. He described also, in evidence, the way in which, according to his story, he disposed of the money which he had taken from Bown.

When the judge came to sum up, he said in his directions to the jury that it had hardly been contended—I think he said that it had not been contended at all by counsel for the appellant—that the crime could be anything less than manslaughter at best for the appellant. Three criticisms have been made of the summing up, to only one of which it is necessary for me to refer in more than a few words. It was said that the judge misdirected the jury by making observations which were likely to leave doubt as to whether they were the judge's expression of opinion or directions which were bound to be followed by the jury. Another suggestion was that the judge failed to direct the jury adequately as to some of the evidence given in cross-examination by the doctor who was called to prove the wounds. The doctor said that the wounds were such as could be caused by a man under the impulse of indignation, provocation or temper. In our view, there is nothing of substance in this suggestion, because it was too evident for discussion that the man who inflicted these horrible wounds upon Bown had been under a mass of impulses which were capable of being described by one of those words, indignation, provocation, or, more probably, temper. The criticism is made, however, that there was non-direction as to the onus of proof where the defence pleads that there was provocation sufficient to reduce the charge to manslaughter.

The course of the judge's summing up was this. First of all, he dealt with the question of the onus of proof. He said that any verdict of guilty which the jury could return could be returned only if they were satisfied that the case, whatever it might be, was proved :

> If you are left in any position of doubt, reasonable doubt, as to the truth of what happened, you will not convict.

He then dealt with the question of self-defence, directing the jury's attention to the horrible character of these wounds, and then he proceeded to deal with the question of manslaughter. In a passage which has been read more than once, he said :

> If you think that [the conduct which was alleged to have been committed by Bown] is such conduct as to deprive a reasonable man of his self-control to such an extent that he would strike the blows which brought about the death, then you will say : " We reduce this crime to manslaughter."

In a later passage, the judge says :

> Members of the jury, when you are asking yourselves this question—even his own counsel did not ask you to say self-defence, so that you can put that aside, but, when you are considering provocation—even taking the story of the prisoner in the best possible light for him, do you find, in the circumstances he has told you, anything which could so deprive a reasonable man of his senses as to account for such an attack as the evidence shows ?

Finally, at the end of the summing up the judge says :

> Killing of this sort is undoubtedly murder unless you think that the provocation he received . . . would be sufficient to deprive a reasonable man of his self-control so as to cause him, a reasonable man, to use the violence that was used on this occasion. If you think that, you may reduce the crime to manslaughter.

From one point of view, that direction was not unfavourable to the prisoner, except with the earlier passage which I have read, because it tells the jury that, if they think the conduct about which the prisoner had given his story would be sufficient to deprive a reasonable man of his self-control so as to cause him to use the violence which was used on that occasion, the crime should be reduced to one of manslaughter.

However, counsel for the appellant has quite properly called our attention to the comparatively recent decision of the House of Lords in *Woolmington* v. *Public Prosecutions Director* (1), where VISCOUNT SANKEY, L.C., having called attention to the fact that it is the duty of the prosecution to prove the prisoner's guilt, elaborated that by saying, at p. 482 :

> When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case : " If the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident."

After deliberation, we have come to the conclusion that the judge did not give a direction to the jury of the character which VISCOUNT SANKEY, L.C., states is the law. It is quite true, as I have said, that the judge gave a direction which was not at all unfavourable to the prisoner, but we have come to the conclusion that it was insufficient, having regard to the absence of a direction to the jury that, if, upon a review of all the evidence, they were left in reasonable doubt as to whether, even if the explanation was not accepted, the act was unintentional or provoked, the prisoner was entitled to be acquitted—that is to say, acquitted of the charge of murder. The direction being, therefore, in our view, insufficient, we think it impossible that the verdict of murder should stand, and in its place we substitute a verdict of manslaughter, and the sentence of the court is that the prisoner shall serve a term of penal servitude of 15 years.

Appeal allowed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re CHALFONT AND DISTRICT PERMANENT BUILDING SOCIETY.

[CHANCERY DIVISION (Morton, J.), **June 24, 1941.**]

Emergency Legislation—Mortgage—Realisation of security—Immediately unable to pay mortgage debt—Whether mortgagor can be asked to sell mortgaged property which is his home.

Instalments under a mortgage having fallen into arrears, the building society, the mortgagees, applied to the court for power to exercise any remedy which might be available to them by way of appointment of a receiver and realisation of the security. The mortgagor pleaded that his inability to pay was due to circumstances arising out of the war within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (4). The mortgagees contended that the mortgagor's ownership of the mortgaged house, the purchase price of which was £1,500, proved that he was not unable "immediately" to pay the mortgage debt of £1,200 within the meaning of the section:—

HELD: the mere ownership of a house equal in value to the mortgage debt was not of itself proof that the mortgagor was "immediately" able to pay the debt. One of the objects of this legislation was to preserve the home of the borrower, and, the mortgagor having shown that his inability to pay was due to circumstances arising out of the war, he was entitled to relief under the Act on condition that he paid reduced monthly instalments.

[**EDITORIAL NOTE.** The main subject of discussion in this application is whether a debtor can be said to be immediately able to pay his debts within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (4), if the only way in which he can provide the money to pay them is by the sale of the house which is his home. It is held that the purpose of the legislation was to avoid such a forced sale where the inability to pay can be shown to be due to the war.

For the Courts (Emergency Powers) Act, 1939, s. 1 (4), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 948.]

Procedure Summons asking that the applicants might be at liberty to proceed to execute any remedy which might be available to them as mortgagees by way of appointment of a receiver and the realisation of the security.

In 1938 the respondent bought from the applicants, a building society, a freehold house for £1,550 and the society allowed £1,240 to be left on mortgage to them. The mortgage was a legal charge providing for the monthly payments usual in a mortgage to a building society. The monthly payment was £9 13*s.* 3*d.* (which included both principal and interest), payable on the first Tuesday in each month. At the outbreak of the war in September, 1939, only one instalment was in arrear, being the instalment due in Aug., 1939. Thereafter, owing to the decline in the respondent's practice, the payment of the instalments was irregular, although from Oct., 1939, the applicants had agreed to accept payments of £6 10*s.* per month, that being approximately the amount of the interest on the loan. In Mar., 1941, the arrears, including fines, amounted to £112.

The evidence showed that the respondent had, since 1920, been carrying on the practice of a solicitor, the practice having been in existence for many years before that time. The profits of the practice had been severely reduced by the war. He had tried to obtain from his bank a second mortgage of the property for the purpose of discharging the arrears due to the applicants, but the bank was unwilling to advance the money. It was further proved that the respondent was entitled under his father's will to a reversionary life interest in the residuary estate. The exact value of this was not known. This life interest was expectant on the death of his stepmother, who was 76 years of age, and, as the respondent was 51 years of age, the insurance policy necessary for the purpose of charging it would be so expensive that no large sum could be raised in this way. He had offered the house for sale at £2,500 but had not found a purchaser. His only other assets were furniture valued at £150. His debts at the time of the application were about £300, of which £250 represented a loan from his wife. The amount outstanding on the applicants' mortgage at the date of the application was just over £1,200, including interest and fines.

R. W. Goff for the applicants.

J. Bradley Dyne for the respondent.

Morton, J.: Counsel for the applicants says that, on the facts, the respondent has not discharged the burden which rests upon him of proving that he is unable immediately to pay the debt or perform the obligation in question, that being the first of two matters on which the court must be satisfied if the case is to be brought within subsect. (4). Has the respondent satisfied me that he is unable to pay the £1,200 ? In the first place, it is quite manifest that from the earnings of his practice alone he would be unable at the moment even to keep up the instalments. The two assets on which counsel for the applicants relies as showing that the respondent has not discharged the onus which lies upon him are, first of all, the house itself, and, secondly, the reversionary interest. As regards the house, counsel for the applicants points out that the respondent has made no real effort to sell it, and it is possible that he has put too high a price upon it, and that that is why he has not yet had any offers of purchase. I think that one of the objects of this legislation is to enable a borrower, in certain circumstances which are stated in the Act, to preserve his home. I do not think that it would be said that, if a man owes £1,200 and has a house—namely, a mortgaged house, which is worth £1,250—he is able to pay the debt, within the meaning of the Act. I do not think that that can be the intention of the legislature. It is true that, in these circumstances, he can sell the house for £1,250 and pay off the whole of the mortgage debt, but, in the very act of doing it, he has lost that which the Act was intended to preserve—namely, his home. In the present case, the position might be different if it were possible for the respondent to raise, on a second mortgage on the house, a sum sufficient to discharge the debt in question. As to that, it is not necessary for me to express a concluded opinion, because the respondent in the present case has tried to raise money from the bank on second mortgage and the bank will advance nothing.

As regards the reversionary interest, I certainly think that the respondent could have taken a little more trouble to inform the court fully about this. I do not ascribe to him any desire deliberately to conceal it, but I should have thought that he might at least have ascertained from the trustees of his father's will the investments now representing the residuary estate of his father, and also he might have obtained some information as to the possibilities of selling or mortgaging that reversionary interest. However, using such knowledge of these matters as I possess, and looking at the matter from a practical point of view, I cannot believe that it would be possible for the respondent to raise anything approaching £1,200 by means of a sale or mortgage of his reversionary interest. I agree that the burden is upon the respondent to satisfy me of his inability immediately to satisfy this debt, and it would have been more satisfactory had I had evidence of the kind which I have indicated, but, viewing the matter as a whole, I am satisfied that the respondent is unable immediately to satisfy this debt of some £1,200.

That, of course, is not the end of the matter. I have then to consider whether the respondent is unable immediately to pay the debt or perform the obligation by reason of circumstances directly or indirectly attributable to the war. Upon the evidence, it appears to me to be established that, if there had been no war, the respondent would have continued to pay the instalments as they fell due, or within a few days thereafter. It appears that he did make these payments up to Aug., 1939. Whether or not he was always regular is a matter which the society has not put in evidence, but, at any rate, when the war broke out he had merely failed to pay the instalment which fell due on the first Tuesday in Aug., 1939. Prior to the war, he was making a reasonable income from his practice, and, although it is clear on the evidence that his practice had suffered somewhat in the first eight months of 1939, and had in these eight months suffered a drop from the previous years' earnings, if he had kept up the instalments, this principal sum of £1,200 would not have become immediately due and payable, and I think that a debtor satisfies the section if the court comes to the conclusion that he would have kept up the instalments but for circumstances directly or indirectly attributable to the war. That being my view of the matter so far, it is manifest that I have a discretion under subsect. (4). The question then arises whether I should exercise that discretion in favour of the respondent and, if so, upon what terms. His counsel asks me to give him relief so long as he pays £6 10*s.* on the first Tuesday in every month or within a reasonable period thereafter. I think that is a reasonable order to make. I shall, therefore, make an order the effect of which will be that the society will not be at liberty to exercise its remedies referred to in the summons so long as the respondent pays the sum of £6 10*s.* within 14 days and on the first Tuesday of every month or within 14 days thereafter.

Summons to stand over generally with liberty to restore if default made in payment, costs to be added to the security.

Solicitors: *Haslewood, Hare & Co.* (for the applicants); *C. V. Young & Son* (for the respondent).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

BARNARD AND ANOTHER *v.* GORMAN.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Wright, Lord Romer and Lord Porter), **July 10, 11, 31, 1941.**]

Criminal Law—Arrest without warrant—Charge of harbouring uncustomed goods with intent to defraud—Accused suspected of having committed offence—"Offender"—Customs Consolidation Act, 1876 (c. 36), *ss.* 186, 197, 199, 202, 203, 205, 221, 224, 229, 233, 267.

The respondent, a ship's steward, arrived in Liverpool on July 4, 1938, from Burma. The two appellants were preventive Customs officers. On July 5, they detained the respondent, took him to the police court, and there charged him with knowingly harbouring uncustomed goods consisting of a box of cigars, with intent to evade the payment of duty thereon, contrary to the Customs Consolidation Act, 1876, s. 186. He was detained in custody for some hours before being released on bail. He came before the Liverpool stipendiary magistrate on July 7, when the charge was dismissed. The respondent then commenced proceedings to recover damages for malicious prosecution and false imprisonment, and the question arose whether, upon the true construction of the Customs Consolidation Act, 1876, s. 186, that section authorised the detention of a person suspected of offending against the section but not in fact guilty of the offence :—

HELD : the word "offender" in the Customs Consolidation Act, 1876, s. 186, is not restricted to an actual offender, and the section authorises the arrest of an alleged or suspected offender. The claim for false imprisonment, therefore, failed.

Decision of the Court of Appeal ([1940] 3 All E.R. 453) *reversed.*

[**EDITORIAL NOTE.** The House of Lords have decided this case purely upon the construction of the section, and have, in effect, adopted the dissenting judgment of MACKINNON, L.J., in the Court of Appeal. The three difficult cases, *Trebeck* v. *Croudace* (1), *Isaacs* v. *Keech* (2) and *Ledwith* v. *Roberts* (3), are discussed, and, to some extent, their Lordships have given their views upon the important matter arising upon them, but, as that matter did not directly arise in this case, those statements must be treated as *obiter dicta.* However, they do give some indication that, when the matter does finally come before them, the House will lend a friendly ear to the suggestion that, where instant action is demanded by the needs of public safety, an honest belief that an offence is being or has just been committed will protect the constable making an arrest. The matter is one of great public importance, since there is no doubt that the police are often hampered in the efficient performance of their duty by the law as it stands at present, as was shown in the recent case of *Stevenson* v. *Aubrook,* [1941] 2 All E.R. 476. To avoid any misapprehension, it should be stated that the footnote to p. 50 is a note by the LORD CHANCELLOR.

AS TO POWER OF ARREST WITHOUT WARRANT, see HALSBURY, Hailsham Edn., Vol 9, pp. 89-95, para. 119; and FOR CASES, see DIGEST, Vol. 14, pp. 183-186, Nos. 1617-1660.]

Cases referred to :

(1) *Trebeck* v. *Croudace,* [1918] 1 K.B. 158 ; 14 Digest 183, *1622* ; 87 L.J.K.B. 272 ; 118 L.T. 141.

(2) *Isaacs* v. *Keech,* [1925] 2 K.B. 354 ; Digest Supp. ; 94 L.J.K.B. 676 ; 133 L.T. 347.

(3) *Ledwith* v. *Roberts,* [1937] 1 K.B. 232 ; [1936] 3 All E.R. 570 ; Digest Supp. ; 106 L.J.K.B. 20 ; 155 L.T. 602.

(4) *Bowditch* v. *Balchin* (1850), 5 Exch. 378 ; 14 Digest 183, *1619* ; 19 L.J.Ex. 337 ; 15 L.T.O.S. 232.

APPEAL by the respondents in the Court of Appeal from a judgment of the Court of Appeal (Scott and Clauson, L.JJ., MacKinnon, L.J., dissenting), dated July 8, 1940, and reported [1940] 3 All E.R. 453. The facts are fully set out in the opinion of Viscount Simon, L.C.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the appellants.

R. F. Levy, K.C., and *M. Turner Samuels* (for *J. Glyn Burrell* on war service) for the respondent.

Viscount Simon, L.C.: My Lords, the principal question involved in this appeal is whether preventive officers of His Majesty's Customs and Excise are authorised by the Customs Consolidation Act, 1876, s. 186, to detain a person whom they believe on reasonable grounds to have committed an offence under that section, or whether, though acting on reasonable grounds, they are liable in damages to the person detained in an action for false imprisonment if the complainant has not actually committed the offence. There is a subsidiary question whether, on the facts of this case, the preventive officers had reasonable grounds for their belief. I will postpone dealing with this second question, since, if sect. 186, on its correct construction, confers no authority to detain a suspected person unless he has actually committed the offence, the question whether the preventive officers had reasonable grounds for their action would not arise.

The matter comes before us in the following circumstances. The respondent was a ship's steward in the British Freedom, which arrived at Dingle Jetty, Liverpool, from Abadan in the early morning of July 4, 1938. Shortly after her arrival, the steamship was boarded by preventive officers of His Majesty's Customs and Excise, who obtained from the master of the ship Customs List No. 142 duly executed, being a declaration signed by the master, officers and members of the crew as to what dutiable goods they had in their possession respectively as their private property. This list was signed by the respondent, and purported to show that he had no cigars in his possession. Subsequently, an assistant preventive officer named Smallwood, in the course of his duty of "rummaging" the ship, found concealed under the mattress of the bunk in an unoccupied state room a box of 100 cigars upon which duty had not been paid, and which had not been declared in the aforementioned list, or at all. Inquiries were made, and following upon these the appellants at 10.30 a.m. on July 5, acting in their capacity as preventive officers, detained the respondent at Dingle Jetty and subsequently took him to the main Bridewell police station at Dale Street in the city of Liverpool, and gave him into custody of the police upon a charge of knowingly harbouring certain uncustomed goods—namely, these cigars—with intent to defraud His Majesty of the duties thereon, contrary to the Customs Consolidation Act, 1876, s. 186. The police detained the plaintiff in custody until 6.40 p.m., when he was released on bail. The charge was heard on July 6, 7, 1938, by the stipendiary magistrate, who, after hearing the case for the prosecution, a submission by the respondent's solicitor, and the evidence of the respondent himself, dismissed the charge, stating that he thought that there was a real doubt, of which the prisoner ought to get the benefit.

The respondent commenced the present action against the appellants in the Court of Passage of the city of Liverpool, claiming damages for false imprisonment and malicious prosecution. At the hearing, the respondent gave evidence and was cross-examined, and the presiding judge, Sir Francis Taylor, K.C., delivered a reserved judgment, ruling that sect. 186 authorised the arrest of any person whom the officers believed on reasonable grounds to be guilty, and holding that, on the facts, there was reasonable ground for their belief. He accordingly dismissed the claim for damages for false imprisonment. He also dismissed the claim for damages for malicious prosecution, and that claim has not been further pursued.

The respondent appealed to the Court of Appeal (Scott, MacKinnon and Clauson, L.JJ.), which by a majority (MacKinnon, L.J., dissenting) allowed the appeal and directed judgment to be entered for the present respondent for the sum of £25 damages for false imprisonment. The majority of the court held that, on the true construction of sect. 186, the word "offender" was confined to persons who had in fact committed an offence. The view of MacKinnon, L.J., on the other hand, was that the word "offender" in this connection could properly be taken to include "a suspected offender," and must not be limited to mean "one who has in fact committed an offence." All the Lords Justices were of opinion that, if reasonable ground for belief that the respondent committed the offence charged was any defence to the action for false imprisonment when the respondent was in fact not guilty of the offence, the appellants had proved such reasonable ground.

The Customs Consolidation Act, 1876, s. 186, is a very long section, which makes it an offence, *inter alia*, for anyone to import into the United Kingdom any goods liable to duty the duties for which have not been paid or secured, and goes on to prohibit various forms of dealing with such goods without the authority of the proper officer of the Customs, including, for example:

> . . . knowingly . . . removing, depositing, concealing . . . any such goods with intent to defraud Her Majesty of any duties due thereon . . .

Although this section describes various offences in different ways, the substance of the matter is that it makes it an offence to deal with goods at the port of import in such a way as to evade duties of Customs. The section ends with the provision that every person who comes within the prohibitions of the section shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs:

> . . . and the offender may either be detained or proceeded against by summons.

The main issue, therefore, is whether the "offender" in the phrase last quoted must be one who has actually committed the offence (which is the view of SCOTT and CLAUSON, L.JJ.), or whether, in its collocation, the word covers also a person who is believed on reasonable grounds to have committed an offence under the section when in fact he has not committed it, this being the view of MACKINNON, L.J., and also of the A presiding judge of the Liverpool Court of Passage. The question is a very serious one, for, on the one hand, it is rightly stressed that the liberty of the subject is involved, and, if an innocent man is detained under official authority, his personal freedom is for the time being interfered with, even though he may be treated with all consideration, B and may, in fact, have suffered little from being in temporary custody. On the other hand, if officers of Customs cannot detain a man who is coming off a ship and whom they suspect on reasonable grounds of endeavouring to defraud the Customs, but must either let him go and rely upon a subsequent summons being effectually served on him, or, if not, C must arrest him at their own risk, the working of our Customs law is likely to be seriously impeded, and the question would arise whether it did not require to be amended. Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because, on a narrower construction, the words might leave a loophole for frauds D against the Revenue. If, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it. That is the business of Parliament. Our duty is to take the words as they stand and to give them their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act, always E preferring the natural meaning of the word involved, but none the less always giving the word its appropriate construction according to the context.

Approaching the problem in this spirit, I confess that I think that the correct solution can be reached without reference to the decided F cases to which we were referred, though, I will, out of respect to the arguments addressed to the House and to the judgments below, refer to these cases in a moment. The final words of the section run as follows:

> . . . and the offender may either be detained or proceeded against by summons.

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If we separate these alternatives and consider the second of them, the provision, therefore, is that the offender may be proceeded against by summons. In this connection, the "offender" cannot possibly be construed as limited solely to the man who is actually guilty of the offence. Whether the "offender" is guilty of the offence charged H will only be determined at the hearing. The summons accuses him of an offence and it remains to be ascertained whether the accusation is justified. It is plain, therefore, that the "offender" who may be summoned must include an innocent person who is wrongfully suspected of having committed the offence. However, if that is so, how can the "offender" have a different meaning when the first alternative is considered ? Here again the detention is preliminary to an accusation, unless, indeed, satisfactory explanations are offered and it is right to let the suspected person go. I cannot think that, in a sentence which uses the words " the offender " only once and then provides for his alternative treatment, the word has a different meaning with a different content according to the alternative adopted.

I arrive at this conclusion, and, indeed, see no possible way of avoiding it, upon the construction of sect. 186 itself. However, it is not immaterial to observe that there are other sections in the statute in which the word " offender " must (as counsel for the respondent admitted in the argument before us) be given a similar extension of meaning. Thus, in sect. 197, on an information being preferred before a justice against any person for an offence against the Customs Acts, the justice may, if there is reason for thinking that such person is likely to abscond

> . . . grant his warrant to bring such offender before him . . .

" Offender " in that sentence plainly means a person charged with an offence, and not necessarily a person who is guilty. Sect. 206 affords an equally plain instance. So does sect. 221, and there are several others. The fact is that the word " offender " has both a narrower and a wider meaning (rather like the word *reus* in Latin). It may have the stricter meaning of one who is guilty of an offence, but it also sometimes has the meaning of a person who is under accusation of having committed an offence. I do not think it would be an abuse of language for a magistrate engaged in a juvenile court to describe his work as that of trying " young offenders," but that would not mean that every boy and girl who came before him was guilty. MACKINNON, L.J., in his dissenting judgment, suggests by way of analogy the double meaning of that curious word " culprit," and refers to its origin. I trust that I may be forgiven the digression if I remind your Lordships that the word " culprit " appears to arise from an abbreviated entry which used to be made on the record of a criminal court engaged in trying a prisoner for felony or treason. The prisoner at the bar was asked how he pleaded to the indictment, and, upon his saying " not guilty," if the prosecutor joined issue, this was recorded in the words : " *culpabilis : prest.*" That is to say : " The prosecution says you are guilty and is ready to prove it." The words were abbreviated in the form : " *cul : prit.*" The clerk of the court then asked the prisoner : " How wilt thou be tried ? " and the prisoner replied, " By God and the country," the last word meaning the jury. (In the old days, the clerk of assize, when addressing the jury after it had been sworn and before trial commenced, told the jury that the prisoner had been arraigned and upon his arraignment had pleaded not guilty, " and for trial has put himself upon God and the country, which country you are" etc.) It has been suggested that the abbreviation " *cul : prest,*" or " *cul : prit,*" though really only a record of joinder of issue, came to be understood to be a word addressed to the prisoner—and hence the modern word "culprit."* It is perhaps some excuse for this *excursus* that the word "culprit" is undoubtedly sometimes used to mean the person guilty of a crime and sometimes (as in the illustration above) to mean the person accused of being guilty, and is, therefore, another example of a word of narrow or wider import according to the context in which it is found.

We were referred to three reported cases in which the question arose whether the language of the legislature in authorising arrest could cover a case where a *bona fide* mistake had been made. In *Trebeck* v. *Croudace* (1), the driver of a motor car in a public thoroughfare was arrested by a police constable under the Licensing Act, 1872, s. 12, which confers on the police the power to apprehend a person in charge of a carriage on a highway who is drunk. The driver was not in fact drunk, though he was reasonably suspected of being so. The Court of Appeal held that the constable's power to apprehend extended to cover a person wrongly but reasonably suspected, mainly on the ground that the nature of the offence, which might well endanger the public, showed that this wider construction was justified. In *Isaacs* v. *Keech* (2), a Divisional Court, consisting of BANKES and SCRUTTON, L.JJ., felt bound by *Trebeck* v. *Croudace* (1) to put this wider construction upon the Town Police Clauses Act, 1847, s. 28. In the course of his judgment, BANKES, L.J., said, at p. 360:

> I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the legislature has in mind is not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence.

In *Ledwith* v. *Roberts* (3), the Court of Appeal held that an action for false imprisonment succeeded when a constable arrested the plaintiffs without warrant under the Vagrancy Act, 1824, and where the persons arrested were not in fact within the description of suspected persons or reputed thieves. GREENE, L.J., pointed out, at p. 257, that the proposition of BANKES, L.J., which I have quoted above, appeared to go a great deal further than what was said in *Trebeck* v. *Croudace* (1), and to lay down a principle of construction applicable to all cases where a statute gives power to arrest without a warrant. As I have said, I do not find it necessary, for the purpose of reaching my conclusion in the present appeal, to pronounce upon these earlier decisions. My own view, however, is that, when the question arises whether a statute which authorises arrest for a crime should be construed as authorising arrest on reasonable suspicion, that question has to be answered by examining the contents of the particular statute concerned rather than by reference to any supposed general rule of construction.

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* This is the explanation in BLACKSTONE'S COMMENTARIES iv. 339, though some of his later editors have doubted it. See, however, MURRAY'S OXFORD DICTIONARY *sub voce* "Culprit," where a learned note, including earlier references, seems to confirm Blackstone's view. The old forms are to be found in "The Office of the Clerk of Assizes . . . together with the Office of the Clerk of the Peace," a rare book with no author's name, the second edition of which appeared in 1682.

On the first point, therefore, this appeal, in my opinion, succeeds, and the only question left is whether, although the appellants had statutory authority to detain an innocent person if he is reasonably suspected of the offence, there was in this particular case no reasonable cause for so acting. On this issue, every judge before whom the present case has come has reached the conclusion that there was reasonable cause. I am of the same opinion. The box of cigars had been bought by the respondent when the ship was at Rangoon, and was kept by him in his own quarters until after the ship arrived at Liverpool. When the respondent put his signature to the Customs list No. 142, the box of cigars was still in his custody. He made no mention of it, but it was found hidden under the mattress in another room when the ship was "rummaged" next day. The story that the cigars were the subject of an agreement of sale with another member of the crew was apparently regarded with suspicion by the presiding judge of the Court of Passage. He said:

> I had the plaintiff [the present respondent] under observation in the witness-box for a considerable time, and he made a most unfavourable impression. As a judge of fact, I could not accept his account. . . . If the story was not accepted, the defendants [the present appellants] had reasonable grounds for believing that the cigars were his property and in his possession when he signed the declaration, and, therefore, they had reasonable grounds for believing that he had committed the offence.

There is, in my opinion, no good reason why this House should reverse the conclusion of fact unanimously reached in both courts below. I move that this appeal be allowed. There will be no order as to costs in this House, as the Crown has very properly agreed (since this is a case of general importance and the respondent is a poor man) to pay the costs of all parties in any event, and not to seek to disturb the order as to costs made in the Court of Appeal.

Lord Thankerton: My Lords, I find myself in complete agreement with the opinion just delivered by my noble and learned friend Viscount Simon, L.C. He has fully and clearly expressed the reasons for his opinion, with which I agree.

Lord Wright: My Lords, this appeal raises an important question which affects the liberty of the subject, but I think that the answer depends on the construction of a few words in the Customs Consolidation Act, 1876, s. 186. This section is one giving powers of arresting or detaining persons in circumstances in which at common law no power of arresting or detaining would exist. It is the duty of the court in construing sections of this nature to balance the two conflicting principles, the one that the liberty of the subject is to be duly safeguarded, the other that the expressed intention of the legislature to give powers of arrest beyond those existing at common law should not be too narrowly construed. In the end, however, the issue falls to be ascertained by deciding the correct meaning to be attributed to the words of the particular section which gives the power, read according to the recognised rules for construing statutes. Sect. 186, the full terms of which are before the House, concludes with the words : A

> . . . the offender may either be detained or proceeded against by summons.

The section deals with a variety of offences which may be committed in order to defraud His Majesty of duties payable on goods being imported, or which consist in being knowingly concerned in any fraudulent evasion or attempt at evasion of any duty of Customs. The section provides B that for each such offence the person concerned shall forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs.

The respondent, a steward on the British Freedom, which arrived at Liverpool on July 4, 1938, was detained on the following day C under sect. 186 of the Act by the appellants, who were preventive officers, and taken to the police station at Dale Street, Liverpool, and there given into custody upon a charge of knowingly harbouring certain uncustomed goods—namely, cigars—with intent to defraud the Crown of the duties due on them. He was kept under arrest for 8 hours and then D released on bail to answer the charge. The charge was heard on July 6, 1938, before the stipendiary magistrate, who dismissed it, stating that he thought that there was a real doubt, of which the prisoner ought to have the benefit. The respondent then brought an action in the Liverpool Court of Passage against the appellants claiming damages for E malicious prosecution and false imprisonment. The presiding judge SIR FRANCIS TAYLOR, K.C., dismissed both claims. The appellants did not, as they might have done, seek to reopen the issue of fact whether the respondent did actually commit the offence, though in these proceedings and between these parties the issue was not concluded by the F magistrates' decision. The presiding judge accordingly dealt with the case on the footing that the respondent was innocent, but found that the appellants had reasonable grounds for believing, as it was conceded they did believe, that he had committed the offence. The Court of Appeal unanimously agreed that this finding of the judge was correct. G It has been again contested before your Lordships, but again without success. There were abundant grounds to justify the finding. There was no appeal against the dismissal of the respondent's claim for malicious prosecution.

The argument on behalf of the respondent has been that "offender" H in the section means actual offender, and that, as the respondent has been found innocent, and, therefore, was not an actual offender, his detention by the appellants was outside the authority conferred by the section and was wrongful. The decision of the judge against the respondent on this issue was reversed by the Court of Appeal by a majority. MACKINNON, L.J., however, dissented, on the ground that "offender" in the section means "a suspected offender," and cannot be limited to mean "one who has in fact committed an offence." He added ([1940] 3 All E.R., at p. 462):

> . . . the defendants must, of course, establish that they had reasonable grounds for their suspicion.

I agree with this conclusion. In this case they had reasonable grounds for their suspicion.

Arrest for a misdemeanour without a warrant, whether by a private person or by a police officer or by any public functionary, may be either under a power conferred by common law or by statute, but, if it is not made under such a power, it is wrongful. In the case of a misdemeanour, there is at common law no power to arrest without a warrant, unless for a breach of the peace being committed in the presence of the person arresting, or the renewal of which is reasonably apprehended, or where there is escape and fresh pursuit after the breach is committed. There is, apart from this common law power, no right to arrest without a warrant in the case of a misdemeanour unless that power is expressly given by statute. The offence in question here is a misdemeanour. For the purposes of the present case, if the power is given at all, it is given by the last twelve words of section 186. The word "offender" is there used only once:

> . . . and the offender may either be detained or proceeded against by summons.

The section authorises two alternative courses with a view to enforcing, or seeking to enforce, the penalties prescribed in the earlier part of it. I think that it is impossible to construe "offender" otherwise than as having one and the same meaning in this short sentence, or as meaning one thing when used in connection with detaining the person and another thing when used in connection with proceeding against him by summons. If "offender" means an actual offender in regard to detention, it must mean an actual offender in regard to proceeding by summons, but so to read it in respect of the authority to take summary proceedings seems, to my mind, to involve a manifest absurdity. The object of proceeding by summons is to ascertain if the man is guilty. It would be unreasonable to enact that a man may be proceeded against by summons only if he is actually guilty, so that the procedure would be without jurisdiction if, on the hearing of the summons, it was found that he was innocent. "Offender" here must accordingly, I think, mean "one who is suspected of or charged with the offence." The provision is clearly intended for the purpose of bringing the charge to investigation. If, however, "offender" has that meaning when read with "proceeded against," etc., and when summary procedure is being authorised, it must, I think, have the same meaning when applied to the authority to detain. In his candid argument, counsel for the respondent conceded that the word "offender" as used in different sections in the statute was not a word to be understood as having a fixed or technical significance, but must take its colour from the context in which it is found. It cannot, however, be accepted that " offender " is so chameleon-like as to change its meaning within the limit of a dozen words. If, as I have shown, it means " suspected offender " in the one connection, it must mean the same in the other connection. It was quite natural for the draftsman to use " offender " in that sense when it would seem that the sense in which it was used was clear. In fact, he has obviously done so in other sections of the same Act. Thus, in sect. 197, " offender " can only mean a person charged with the offence. The section provides :

> . . . if . . . it shall be made to appear to such justice that such person is likely to abscond, such justice may, in lieu of issuing a summons for his appearance, grant his warrant to bring such offender before him.

The opening words of the section supply the definition of " offender " in that section. The section begins :

> Any person brought before any justice for any offence [that is, charged with any offence] against the Customs Acts . . .

" Offender " thus means " suspected offender." The charge may be dismissed. He cannot properly be called an offender in the strict sense until he is convicted. In sect. 221 I think " offender " is also clearly used in the sense of accused or suspected offender. The section provides for the justice arresting or holding the " offender " to bail and bringing such " offender " before him, and, on his being so brought, requiring him to give security to appear for the hearing of the case. There again the detention is precautionary, and is preparatory to ascertaining whether he has committed the offence or not. On the other hand, in sect. 190 the word " offender " is qualified by being " duly convicted," and this refers to an actual offender, and in sect. 233 also " offender " is clearly, from the context, used in the sense of actual or convicted offender. In sect. 186, on the contrary, it is obvious that the word " offender " describes a person who has not yet been tried and in law, though suspected, is still innocent.

I need not multiply instances from the Customs Consolidation Act, 1876, showing that the word " offender " is a neutral term conveniently used in drafting, not in a strict or technical sense, but taking from the particular context the appropriate meaning, either of actual offender or of suspected or accused offender. I thus here define the ambit of the power to detain from the actual language of the statute, and not from any implication. I am not prepared to construe the power to detain by holding that " offender " in the relevant section means actual offender and then reading in by implication as a further definition or extension of the power to detain words such as : " the offender [the actual offender] or such person as the officer reasonably and honestly believes to be an offender." There are statutes where power to arrest without warrant on reasonable cause to suspect is given in express terms, but in general I think such an extension of the express power merely by implication would be unjustified. As Pollock, C.B., said in *Bowditch* v. *Balchin* (4), at p. 381 :

> In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.

In that case, the City of London Police Act, 1839, gave to a member of the City of London police force power to arrest without warrant all loose, idle and disorderly persons whom he should have good cause to suspect of having committed, or intending to commit, any felony, misdemeanour or breach of the peace, and it was held by the Court of Exchequer that the words " loose, idle and disorderly persons " were overriding words. In effect, the condition precedent to the power was that the man arrested fell within the description. It was only if that condition was satisfied that it became competent to act upon the further grounds of suspicion or actual conduct in the case. It was contended there, that it was enough if the constable had good cause of suspicion, even though the man arrested did not come within the specified category of persons. ALDERSON, B., answered, at pp. 380, 381 :

> If the legislature had so intended, they would have inserted the words, " and all other persons."

It is always dangerous to construe words in one statute on the analogy of the construction adopted in the case of another statute. If it were necessary, I should need to consider whether the decision of a Divisional Court in *Isaacs* v. *Keech* (2) is consistent with that in *Bowditch* v. *Balchin* (4), or whether the words " common prostitute or night-walker loitering and importuning passengers for purposes of prostitution " do not involve two conditions—namely, (i) that the woman should belong to the particular category of persons, and (ii) that she should be loitering and importuning. The legislature may well have thought that, when they give the power to arrest without warrant for particular conduct, the power should be limited to the case of particular categories of persons whose previous conduct or character or reputation renders them peculiarly open to suspicion, as in *Bowditch* v. *Balchin* (4). The Divisional Court in *Isaacs* v. *Keech* (2) regarded themselves as bound by the decision of the Court of Appeal in *Trebeck* v. *Croudace* (1). That, however, was a different case. There was there no overriding condition that the person arrested should answer to a general description. The power to arrest depended on the particular acts done or conduct exhibited. It was a power, *inter alia*, to arrest without a warrant every person found drunk while in charge of any carriage on a highway. While I do not wish to express any final opinion on a case not now before me, I am not prepared to dissent from the actual decision of the Court of Appeal that the arrest was justified if the constable reasonably believed from the man's appearance and behaviour that the man was drunk, even though eventually the magistrates dismissed the charge. As at present advised, I think that " drunk " in that context means " apparently drunk." The constable must act upon what he sees at the moment, and should be held to be justified if the man's appearance and behaviour are those of a drunken man. Instant action is demanded by the needs of public safety, which would be endangered if an intoxicated person were left in charge of a vehicle on the road. Swinfen Eady, L.J., at p. 165, said that the nature of the offences specified required the construction that the authority to apprehend applied where the circumstances were such as to enable to exist an honest belief upon reasonable grounds that the offence was being committed by the person being apprehended. In the particular classes of offences there considered, I may add that the constable must act upon external appearances and a reasonable inference from these appearances, and a word like " drunk " may well be construed in that context, as contrasted with its meaning in a statute imposing penalties for being drunk while in charge of a vehicle, such as a motor car, to refer merely to external appearances, even though the appearances may afterwards be held to have been misleading. Bankes, L.J., said, at p. 167, that action must of necessity be founded on the circumstances of the moment and mainly, probably, on such information as the senses of a police constable, his sight and hearing, convey to him.

However, I must not be taken to be assenting to the proposition of Bankes, L.J., in *Isaacs* v. *Keech* (2), at p. 360, that a power to arrest without warrant a person found committing an offence is in general or *prima facie* a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence. In every case, the power to arrest without warrant must be justified by the common law or by statute. In the latter case, the power must be found in the words of the particular statute relied upon, construed according to ordinary principles. Thus a decision on one statute may afford no real guidance in deciding what is the effect of another statute. This general rule was emphasised by the Court of Appeal in *Ledwith* v. *Roberts* (3), where it was said that it was essential to scrutinise the particular statute and see what precisely are the powers to arrest given and what are the conditions of their exercise. In substance, it was there held that, on the construction of the statutory provisions in question, it was a condition of the power to arrest that the persons arrested should in fact belong, and not simply be suspected to belong, to the classes of persons specified. The particular enactments in question are not on this occasion before the House, and their construction has not been the subject of argument, so that I abstain from expressing any final opinion on the decision. I think that this appeal should be decided simply on the language of sect. 186. As I construe the language of the section, the detention was, in my opinion, justified. In my opinion, the appeal should be allowed.

Lord Romer : My Lords, the question to be decided upon this appeal is undoubtedly one of considerable importance, for it is concerned with the liberty of the subject. It is, nevertheless, as I see it, a very short and a very simple one, for it is concerned with the meaning to be attributed to merely one word in one section of the Customs Consolidation

Act, 1876. The section is sect. 186, and the word is "offender." I need not repeat the section in full. It is sufficient to say that it enacts that every person who shall commit any of certain specified offences shall for each such offence incur the forfeiture or penalty therein prescribed, and it concludes as follows:

> . . . and the offender may either be detained or proceeded against by summons.

The question that your Lordships are asked to determine is whether the word "offender" as there used means a person who has committed one of the specified offences or whether it means a person who is suspected of having committed one. That the ordinary meaning of the word "offender" is a person who has in fact offended must be conceded, but the context in which a word is found may be, and very often is, strong enough to show that it is intended to bear other than its ordinary meaning, and such a context is, in my opinion, to be found in the present case, for the section provides that the offender may be proceeded against by summons, and to give the word "offender" in this connection its ordinary meaning would be to render the provision nonsensical. It would mean that, before issuing the summons, the magistrate would have to decide that the offence had in fact been committed. The principle of "Verdict first and trial afterwards" might, as on one occasion did that of "Sentence first and verdict afterwards," find some support in the Court of Wonderland, but it is not one that is regarded with favour in this country. Furthermore, if the offender failed to appear upon the hearing of the summons, any warrant issued for his arrest would have been issued illegally should the defendant's innocence subsequently be established. In this last-mentioned event, moreover, any proceedings upon the summons taken in his absence would be a mere nullity, and could be successfully challenged by him. It seems clear, therefore, that, when the section provides that the "offender" may be proceeded against by summons, the word "offender" means a person suspected of having committed an offence. That was the view of SCOTT, L.J., and so far I agree with him.

My Lords, it very often happens that a word is used in more than one section of an Act of Parliament, and that it bears one meaning in one section and a different meaning in another. It may even happen that a word is used in different senses in the same section of an Act, but to arrive at the conclusion that the noun "offender," which appears only once in the section under consideration, has one meaning when applied to the verb "detain" and a different meaning when applied to the words proceed against by summons" requires a feat of mental gymnastics of which I personally am quite incapable.

It only remains to deal with one other matter. It is said that, when the appellants detained the respondent, they had no reasonable or probable ground for suspecting that he had committed an offence. If this could be shown to be the fact, the respondent would be entitled to succeed, for, in that case, the appellants would not have been using the power of detention conferred upon them by the section. They would have been misusing it, and could not, therefore, justify the detention of the respondent. I am, however, satisfied upon this question, upon which the Court of Appeal were unanimous in affirming the presiding judge of the Liverpool Court of Passage, that the appellants are entitled to succeed. The story that they were told by the respondent and Rioch was one which was calculated to excite the suspicion of the least suspicious officer of His Majesty's Customs. It was obviously one which required the closest investigation. The magistrate who subsequently did investigate it was apparently left in some doubt as to the truth of the story, but in the end he gave the respondent the benefit of the doubt. That the respondent was in fact innocent of the charge brought against him cannot now be questioned, but that the appellants had reasonable and probable cause for suspecting the contrary seems to me to be quite clear. My Lords, for these reasons, I would allow this appeal, and I concur in the motion before this House.

Lord Porter [read by Lord Thankerton]: My Lords, the essential facts in this case are of the shortest. Two Customs preventive officers arrested the respondent on July 6, 1938, for alleged breaches of the Customs Consolidation Act, 1876, s. 186. He was brought before a magistrate, charged with knowingly harbouring uncustomed goods, and acquitted. He then brought an action against the arresters for damages for false imprisonment, and your Lordships have to determine whether he can succeed in that action. Two questions only were argued. (1) Had those officers any right to arrest the respondent ? (2) If they had such a right, has it been established that they had reasonable and probable cause for believing that the respondent had committed the offence with which he was charged ?

It was admitted on behalf of the respondent that the appellants did in fact genuinely believe that he had committed the offence, and conceded on behalf of the appellants that the right of arrest which they claimed could not legally be exercised unless they had reasonable and probable cause for their belief.

Of the two questions argued before your Lordships, one, the second, is a question of fact, and it has already been held by two courts—namely, the Court of Passage in Liverpool, in which the action was brought, and the Court of Appeal—that there was reasonable and probable cause for the appellants' belief. It would require strong grounds to make your Lordships' House differ from this conclusion. The judge of the Court of Passage saw and heard the evidence of the respondent, and found himself unable to accept the account of the incidents leading up to the arrest given by the witness, of whom he formed a most unfavourable impression. No further evidence was called, but certain matters upon which the appellants relied as giving them reasonable and probable cause for believing the respondent to be guilty were set out in the particulars of the defence, and were admitted by the respondent. Upon that evidence, both the judge of first instance and the Court of Appeal took the view that the appellants had reasonable and probable cause for their belief. The respondent and an apprentice named Rioch were said A to have been implicated in trying to import two boxes of cigars without paying duty. From the admitted facts and the witnesses' evidence, it appears (i) that the cigars had been found hidden in the respondent's quarters, (ii) that the time at which he and the apprentice spoke of their being handed over by the former to the latter was long after the Customs B form had been completed by both, and (iii) that that form contained no entry showing that either of them was in possession of cigars. The whole story was a suspicious one, and the magistrate who heard the case gave, as he said, the respondent the benefit of the doubt. There was, in my opinion, ample evidence for the view held by both courts, C and I think that they were fully justified in their finding.

The second question depends solely upon the true construction of sect. 186 of the Act. The relevant portion of that section may for my purpose be limited to the words :

> Every person who shall . . . knowingly harbour . . . any . . . uncustomed goods . . . shall for each such offence forfeit either treble the value of the goods, D including the duty payable thereon, or £100, at the election of the Commissioners of Customs ; and the offender may either be detained or proceeded against by summons.

"Offender" is the word used, and the argument on behalf of the respondent is that "offender" means, and can only mean, one who E actually committed the offence, and that the respondent, having been found not guilty, was not an offender, and could not lawfully be arrested, unless it was alleged and proved in the civil proceedings that he really had committed the offence.

The appellants, however, did not attempt in the civil proceedings F to controvert the magistrate's finding, and, therefore, the question to be determined is : Are Customs officers entitled to arrest a person whom they honestly and with reasonable and probable cause suspect of having committed an offence against sect. 186, or is the right of arrest confined to a case where the person arrested actually committed G the offence ? The majority of the Court of Appeal thought that it meant the latter. In their view, the word "offender" in its ordinary meaning means a guilty person, and they found nothing, or at any rate nothing sufficiently conclusive, in the collocation of the word in the section to cause them to modify that meaning. My Lords, they were H no doubt strengthened in their resolve to construe the section strictly by the consideration that it dealt with the liberty of the subject, and that that liberty should not lightly be put in jeopardy. No one of your Lordships is less anxious than the Court of Appeal that the greatest weight should be given to such a consideration, and, if I thought that the word "offender" could only bear the meaning which has been attributed to it, or even if I thought it could fairly be so construed in the Customs

Consolidation Act, 1876, s. 186, I should unhesitatingly support that view. However, I do not think that " offender " in all cases necessarily means one who has committed an offence. No doubt that is the *prima facie* meaning, and, if there was nothing in its surroundings to suggest another interpretation, the primary meaning should be adopted, but the word is capable also of meaning a person charged with, or suspected of having committed, an offence, or, to put it more broadly, of meaning an alleged offender. I do not think one would feel that the expression " the offender was committed for trial " is impossible, yet I do not imagine that those words would convey to the hearer the impression that the accused man was necessarily guilty.

The difficulty of construing the word in sect. 186 in a sense other than that of a suspected person is that the same word is used in the same sentence in reference to one to be proceeded against by summons as well as in reference to one liable to arrest. Can it have been intended that procedure by summons should only be used against a guilty person, and that preventive officers could safely proceed under the section only if they could do what in fact they could never do with certainty—namely, guarantee a conviction ? The representatives of the respondent maintained that the section was only meant for use in plain cases, and that, so used, the risks were negligible. However, Customs officials are executive officers, not judges, and must bring the case to a court for it to determine the guilt or innocence of the accused, unless, indeed, the offender consents to a compromise. A more natural explanation is that " offender " means a suspected person, and I should so interpret it in sect. 186, even if that section stood alone. If this interpretation be adopted, the accused would still have the protection against arrest which all suspected persons have by law—namely, that those who take them into custody must have reasonable and probable cause for their action. However, the section does not stand alone, and the appellants' contention is fortified by the use of the word "offender" in other sections which show that, in a proper collocation, the word can, and in the Act does, mean suspected persons. Sects. 190, 197, 199, 202, 206, 221 and 229 are all illustrations of this use. SCOTT, L.J., recognised this fact, and, indeed, refers to the difficulty of construing the same word in the same section in two different ways, but felt constrained to give it its *prima facie* meaning in the one connection, even though it must bear a different meaning in the other. For myself, I do not think it justifiable to interpret the word in two separate ways. In my view, the wording of sect. 186 alone shows that arrest is permitted provided the person arrested is with reasonable and probable cause suspected of an offence, but, if support for this view is required, the rest of the Act affords many instances of a similar use of the word.

Three cases were quoted to your Lordships as laying down some general principles which were said to be of assistance in construing the section under consideration. In the first, *Trebeck* v. *Croudace* (1), the Licensing Act, 1872, s. 12, which enacted that "Every person . . . who is drunk while in charge on any highway . . . of any carriage may be apprehended," was interpreted as meaning that every person who is honestly and with reasonable and probable cause believed to be drunk may be apprehended. In *Isaacs* v. *Keech* (2), a similar construction was adopted in the case of the arrest of certain persons under the Town Police Clauses Act, 1847, s. 28, who "within view of a constable" had committed certain offences. The only general principle for which these cases furnish authority is that, in construing an Act of Parliament, it is proper to regard the general purposes of the Act. The application of this principle to the particular incidents of the cases quoted is immaterial for consideration in the present case. Nor, indeed, do I gain much assistance from the third case referred to. *Ledwith* v. *Roberts* (3) turned upon the meaning of the Vagrancy Act, 1824, s. 4, as amended by the Prevention of Crimes Act, 1871, and the Penal Servitude Act, 1891, which enacted that, "Every suspected person or reputed thief frequenting any street with intent to commit felony shall be deemed a rogue and a vagabond," and upon sect. 6, which provided that: "It shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act." The actual decision was that the arrest could only be justified if the person arrested was a member of the class specified, and, though some of the observations made in the judgments delivered go further, they do not seem to me to be essential to the decision, or to lay down any general principles which would assist your Lordships in the present case. All three seem to turn upon the particular wording of the section then under review, and in no way to provide matter for consideration in the present case. I should allow the appeal and restore the judgment of the judge.

Appeal allowed.

Solicitors: *Solicitor to the Customs and Excise* (for the appellants); *Silverman & Livermore* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RICKARDS *v.* FORESTAL LAND, TIMBER AND RAILWAYS CO., LTD.
ROBERTSON *v.* MIDDOWS, LTD.
KANN *v.* W. W. HOWARD BROTHERS & CO., LTD.

[House of Lords (Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Wright and Lord Porter), **May 1, 2, 5, 8, 12, July 30, 1941.**]

Insurance—Marine insurance—Cargo—War—Government decree controlling shipping—Ship attempting to return to enemy country in obedience to decree—Scuttling of ship—Frustration of voyage—Liability of insurers of cargo—Marine Insurance Act, 1906 (*c.* 41), *ss.* 45, 49, 60, 91 (2).

A cargo in a German-owned steamship was insured for a voyage from South American ports to Hong Kong or Shanghai, including transhipment to Durban. The policy was in the usual Lloyd's form, but "including damage by hook, oil, sweat, heat, fresh water and other cargo (liquid or solid), theft, pilferage and non-delivery . . ." The policy was expressly warranted free of any claim based upon loss or frustration of the insured voyage or adventure caused by arrests, restraints or detainment of kings, princes or peoples. The vessel arrived at Rio on Aug. 25, 1939. War was declared on Sept. 3, 1939. The vessel sailed from Rio on Sept. 6, 1939, and on Sept. 29, 1939, in the presence of a British warship, she was scuttled by her master and crew off the Faroe Islands. At all times after Aug. 16, 1939, the German government had taken control of all German-owned merchant shipping, and had given orders to all such vessels and their masters to take refuge in neutral ports or return to Germany, or, as a last resort, to scuttle their vessels. The plaintiffs claimed for a total loss, either actual when the ship was scuttled or constructive when the ship was at Rio and war broke out, or, at the latest, when she sailed from Rio. Under another policy in similar terms, goods were shipped on a German-owned vessel for carriage from Bremen to Capetown. On a normal voyage, the vessel would have reached Capetown about Sept. 12, 1939, but, having arrived at Las Palmas on Aug. 29, 1939, the vessel then sailed for Vigo, Spain, where she arrived on Sept. 1, 1939. She left Vigo on Feb. 10, 1940, and arrived in Hamburg on Mar. 5, 1940. Under a further policy in similar terms, goods were shipped on a German-owned vessel for carriage from Bunbury, Australia, to London. The ship passed the Cape of Good Hope on Aug. 18, 1939, and, on a normal voyage, would have reached London about Sept. 16, 1939. She sheltered at the neutral port of Bissao in Portuguese Guinea on Sept. 6, 1939. She left there on Oct. 13, 1939, and was scuttled in the presence of a French warship on Oct. 16, 1939. Although no notice of abandonment was given in each case, the underwriters agreed to waive the absence of such notice :—

Held : (i) since the insured had in each case suffered a constructive total loss of the goods through the action of the German government, they were entitled to recover for such loss under the respective policies of insurance. On the true construction of the contracts, the frustration clause afforded no defence to the underwriters, since, if there had been a constructive total loss of the goods within the meaning of the Marine Insurance Act, 1906, s. 60, the mere fact that there had also been a loss of the voyage could not exclude the right of recovery for the former loss.

(ii) the change of voyage was involuntary and, therefore, the deviation was not such as would prevent the assured from recovering under the policy.

Decision of the Court of Appeal ([1940] 4 All E.R. 395) *affirmed.*

[**EDITORIAL NOTE.** The real contest in this case in the appellate courts has been on the proper construction of the frustration clause in a policy of marine insurance. This clause was inserted in such policies to avoid the construction put upon them in *Sanday's* case (1), where an insurer recovered although there was no loss of the goods. Basing his judgment on passages used in deciding that case, HILBERY, J., took the view that, in a policy of marine insurance of goods, the subject-matter of the insurance is the adventure of the goods on the voyage and, therefore, in dealing with the subject-matter of such insurance, the goods cannot be separated from the voyage. Both the Court of Appeal and the House of Lords, in rejecting this view, state that the law has always been that such an insurance covers both the goods and the adventure, and that, apart from special clauses, the loss of either gives rise to a claim against the insurers. The effect of the insertion of the frustration clause is to avoid a claim in respect of the loss of adventure where the goods are not lost, but not a claim in respect of the total or partial loss of the goods where there is a loss of the adventure. The goods are lost, and it is unnecessary for the assured to rely upon the loss of the adventure. Underwriters do not succeed in proving a loss within the exception merely by showing that the adventure has been lost. They must go further and show that the claim of the assured is based upon the loss of the adventure, and not merely that the loss of the adventure is a result of the loss of the goods, even though that loss be due to combatant seizure. The opinions of LORD WRIGHT and LORD PORTER deal in detail with the subsidiary points arising out of the facts, particularly the question whether there was a constructive total loss of the goods, and, if so, at what moment such loss could be said to have occurred. Though this point is of much interest, it is of little importance in these cases, because there was an actual total loss of the goods before the writs were issued.

AS TO WAR RISKS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-319, paras. 439-443 ; and FOR CASES, see DIGEST, Vol. 29, pp. 216-219, Nos. 1720-1758.]

Cases referred to :

(1) *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday (Samuel) & Co.*, [1916] 1 A.C. 650 ; 29 Digest 276, *2236* ; 85 L.J.K.B. 550 ; 114 L.T. 521 ; *affg.* S.C. *sub nom. Sanday & Co.* v. *British & Foreign Marine Insurance Co.*, [1915] 2 K.B. 781.

(2) *Hamilton* v. *Mendes* (1761), 2 Burr. 1198 ; 29 Digest 273, *2208*.

(3) *Goss* v. *Withers* (1758), 2 Burr. 683 ; 29 Digest 272, *2207*.

(4) *Milles* v. *Fletcher* (1779), 1 Doug. K.B. 231 ; 29 Digest 277, *2247*.

(5) *Barker* v. *Blakes* (1808), 9 East, 283 ; 29 Digest 284, *2315*.

(6) *Phelps* v. *Auldjo* (1809), 2 Camp. 350 ; 29 Digest 152, *1068*.

(7) *Robertson* v. *Petros M. Nomikos, Ltd.*, [1939] A.C. 371 ; [1939] 2 All E.R. 723 ; Digest Supp. ; 108 L.J.K.B. 433 ; 160 L.T. 542.

(8) *Mellish* v. *Andrews* (1812), 15 East, 13 ; 29 Digest 281, *2285*.

(9) *Atlantic Mutual Insurance Co.* v. *King*, [1919] 1 K.B. 307 ; 29 Digest 226, *1839* ; 88 L.J.K.B. 1001 ; 120 L.T. 191.

(10) *Miller* v. *Law Accident Insurance Co.*, [1903] 1 K.B. 712 ; 29 Digest 219, *1748* ; 72 L.J.K.B. 428 ; 88 L.T. 370.

(11) *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1918] A.C. 101 ; 29 Digest 208, *1675* ; 87 L.J.K.B. 69 ; 117 L.T. 609.

(12) *Ruys* v. *Royal Exchange Assurance Corpn.*, [1897] 2 Q.B. 135 ; 29 Digest 266, *2146* ; 66 L.J.Q.B. 534 ; 77 L.T. 23.

(13) *Captain J. A. Cates Tug & Wharfage Co.* v. *Franklin Insurance Co.*, [1927] A.C. 698 ; Digest Supp. ; 96 L.J.P.C. 132 ; 137 L.T. 709.

(14) *Polurrian S.S. Co., Ltd.* v. *Young*, [1915] 1 K.B. 922 ; 29 Digest 273, *2213* ; 84 L.J.K.B. 1025 ; 112 L.T. 1053.

(15) *Samuel (P.) & Co.* v. *Dumas*, [1924] A.C. 431 ; 29 Digest 112, *666* ; 93 L.J.K.B. 415 ; 130 L.T. 771.

(16) *Stringer* v. *English & Scottish Marine Insurance Co.* (1870), L.R. 5 Q.B. 599 ; 29 Digest 255, *2067* ; 39 L.J.Q.B. 214 ; 22 L.T. 802.

(17) *Roux* v. *Salvador* (1836), 3 Bing. N.C. 266 ; 29 Digest 263, *2129* ; 7 L.J.Ex. 328.

(18) *Woodside* v. *Globe Marine Insurance Co.*, [1896] 1 Q.B. 105; 29 Digest 246, *1985*; 65 L.J.Q.B. 117; 73 L.T. 626.
(19) *Forbes* v. *Aspinall* (1811), 13 East, 323; 29 Digest 251, *2035*.
(20) *Usher* v. *Noble* (1810), 12 East, 639; 29 Digest 247, *1994*.
(21) *Rodoconachi* v. *Elliott* (1874), L.R. 9 C.P. 518; 29 Digest 218, *1747*; 43 L.J.C.P. 255; 31 L.T. 239.
(22) *Lozano* v. *Janson* (1859), 2 E. & E. 160; 29 Digest 267, *2148*; 28 L.J.Q.B. 337; 33 L.T.O.S. 270.

APPEAL by the underwriters from a decision of the Court of Appeal, dated Nov. 25, 1940, and reported [1940] 4 All E.R. 395. The facts are fully set out in the opinions of LORD WRIGHT and LORD PORTER.

A. T. Miller, K.C., and *A. J. Hodgson* for the appellants.

Sir Robert Aske, K.C., and *Cyril T. R. Miller* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, I have had the advantage of studying in printed form the opinions which are about to be delivered in these three appeals by my noble and learned friends LORD WRIGHT and LORD PORTER. Those opinions set out the essential facts in the three cases which have been selected by underwriters and cargo-owners as providing typical illustrations, in different forms, of the problem before us. I forbear, therefore, to summarise the facts on my own account, and, moreover, inasmuch as I entirely agree with my noble and learned friends in the conclusions at which they arrive and in the course of reasoning which has led them to their result, I shall content myself with a more summary statement of what I regard as the main principles governing the matter.

In each of the three cases the trial judge, HILBERY, J., in a careful and detailed judgment decided that the underwriters were, in the events which had happened, under no liability to the assured. The Court of Appeal (SCOTT, MACKINNON and LUXMOORE, L.JJ.) took a different view, and entered judgment in each case against the underwriters. The underwriters now appeal to this House, and the representative character of the three cases which have been selected to raise the issue is emphasised by the arrangement which has been made between the underwriters and the cargo-owners that the former undertake to pay costs up to this House in any event. We have had the assistance of full and careful argument from counsel on each side, and I believe that the House has reached the unanimous conclusion that the underwriters' appeals should be dismissed.

In each of the three cases the claim is by British owners of cargo against Lloyd's underwriters on voyage policies on goods which were shipped in German steamers to places in the British Empire, and we are informed that the values of cargoes amounting to many millions of pounds may depend on the issue. In each case, the German ship had entered upon the performance of her contract of carriage with the British cargo-owners before the outbreak of war and had not completely performed her contract before the war broke out. Each of these German vessels, in common with all other German-owned merchant shipping which was sailing the seas, was subject to German war policy, imposed by directions issuing from the German government, to the effect that, if war threatened between Great Britain and Germany, or if war actually broke out, the ship must take refuge in a neutral port and, if possible, return to Germany with her cargo, or, as a last resort, must scuttle herself rather than be captured. On and after Sept. 3, 1939, there was risk of capture of each of these vessels when outside the territorial waters of any neutral state. The vessels, in each of the three selected cases, deviated from the accustomed and natural course in order to take refuge in other ports in accordance with the general directions which they had received from the German government. Ultimately they abandoned the contractual voyage altogether and made an effort to get back to Germany. Two of them were in danger of being captured in the Allied blockade and accordingly scuttled themselves. The third succeeded in getting through to Hamburg. For a more precise statement of dates and places, I would refer to the opinions prepared by my noble and learned friends Lord Wright and Lord Porter.

The cargo in each case, as I have said, was covered by a voyage policy covering both war and marine risks. The insured perils include :

> . . . of the seas, men of war, fire, enemies . . . surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people . . . and all other perils, losses and misfortunes that have or shall come to the hurt, detriment and damage of the said goods and merchandises.

However, there is added in italics what has been called in argument the frustration clause as follows :

> . . . warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power.

Two questions arise. First, if the frustration clause was not contained in the policy at all, would the cargo-owners be entitled to recover ? In other words, did the loss of their goods occur at a time when they were still covered by the policy ? Secondly, even if the cargo-owners could make good their claim under the policy in the absence of the frustration clause, does the frustration clause operate so as to relieve the underwriters from the liability which would otherwise attach to them ? On the first of these questions, for the reasons more fully developed in the opinions of my noble and learned friends to which I have referred, I hold that there was a constructive total loss of the goods while they were still covered by the policy. The constructive total loss occurred when the German captain obeyed the instructions of his government and held the goods as the subject and servant of that government instead of holding them as the bailee of the assured. That was, in the circumstances, a restraint of princes or peoples. Normally there can only be a claim for a constructive total loss if notice of abandonment has been given, but it is conceded that the appellants here do not rely on the absence of such notice. Indeed, they could hardly do so, for it is agreed that the assured knew nothing of the fate of the goods until it was too late for the underwriters to gain any advantage from such notice. It follows from the Marine Insurance Act, 1906, s. 62 (iii), (vii), that lack of notice would be excused.

So far, I think, the trial judge would find himself in agreement with the Court of Appeal and with my own view. However, the second question then arises—namely, whether the frustration clause operates to take away A from the assured the right which would otherwise be his to claim, as above, for a constructive total loss. On this, the crucial issue, my view is entirely that expressed by SCOTT and MACKINNON, L.JJ. When goods are insured under a voyage policy, the subject-matter of the contract is, of course, the goods engaged in the adventure. Loss of or damage to the B goods on the voyage gives rise to a valid claim. However, since the decision in this House in *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday* (*Samuel*) *& Co.* (1), it has been finally settled that, even though the insured goods are safe, a claim under the policy may be validly based upon loss of the adventure by reason of a peril insured against. MACKINNON, L.J., puts the matter most clearly thus ([1940] 4 All E.R., at p. 405) : C

> The subject-matter of the contract is, of course, the goods, and they are insured against loss or damage by insured perils, but, even if the goods are not so lost or damaged, there is an additional insurance against the loss of their voyage. The judge considers this to be not an additional risk, but an essential part of it in every case, whereas both of the two quotations from BAILHACHE, J., and LORD READING, L.C.J., which he cites just afterwards, make it clear that this is only an additional D risk. BAILHACHE, J., says, at p. 832 : "It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured." Almost identical words are used by LORD READING, L.C.J.

The question, therefore, is whether, in the circumstances which we are considering, the claim of the respondents is : E

> . . . based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints, or detainments of kings, princes, peoples, usurpers, or persons attempting to usurp power.

If any and every claim for loss of goods by war peril is rendered futile by the insertion of the frustration clause, the policy, so far as loss by war F perils is concerned, is perfectly useless. Such a result is no doubt possible if clear and apt words are used, with the result that the underwriter takes away with one hand what he gives with the other, but it seems to me that the fallacy in the argument arises from assuming that every loss of goods is "based upon loss of adventure." I agree with the Court of Appeal in G thinking that the proper interpretation of the frustration clause is not "free of any claim which on the facts might be based on loss of the insured voyage," and that its proper meaning must be "free of any claim which is in fact based, because it can only be based, upon loss of the insured voyage." The above considerations have led me to the con- H clusion that the main contention of the underwriters must fail. I have not overlooked the variations in the main problem which are introduced by the special facts in each case, or the arguments addressed to us on the subject of deviation and (in the case of the Wangoni) of an alleged offer under which the goods might be redeemed at a price. On these and other matters with which I have not expressly dealt I agree with the conclusions arrived at in the opinions of LORD WRIGHT and LORD PORTER to which I have referred. I move that the appeals be dismissed.

VISCOUNT MAUGHAM: My Lords, your Lordships have before you appeals relative to three different claims by British cargo-owners against Lloyd's underwriters on three different policies in, or closely approximating to, standard form. The cases are described as test cases, and the facts in each case have been set out in agreed statements. It is unnecessary for me to repeat these statements in any detail. The goods were carried in three ships, the Minden, the Wangoni and the Halle, all of them German-owned vessels. The cargo-owners (the respondents) and the underwriters (the appellants) are British. War between Great Britain and Germany broke out on Sept. 3, 1939, after the three ships had started on their voyages, and it is agreed that as from that date there was an effective blockade of all German ports by the British and French naval forces, who were further taking all possible steps to intercept and capture or destroy all German merchant vessels on the high seas. It is also agreed that at all material times the German government, in furtherance of German war policy, had taken control of all German-owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels.

In each case, the respondents claimed for a loss of goods under the policy. The losses were claimed to have arisen in the following circumstances. The Minden sailed from Buenos Aires on her voyage for Durban as her first port of call, with the insured goods on board. She arrived at Santos on Aug. 24, 1939, and left on the same day. She arrived at Rio on the following day, and left on Sept. 6, 1939, but not for Durban. When off the Faroe Islands on Sept. 29, 1939, she was scuttled in the presence of a British warship by those on board her, and was lost with all her cargo. The Wangoni left Hamburg for South Africa with Capetown as her first port of call, but she did not proceed thither. On Aug. 29, she put into Las Palmas and returned thence to Vigo, in Spain, on the same day. She arrived at Vigo on Sept. 1, 1939, and remained at that port until Feb. 10, 1940. On Feb. 10, 1940, she sailed for Hamburg, where she arrived on Mar. 5, 1940, having managed to run the British and French blockade which was then in full force. The respondents' goods remained on board throughout, but upon two occasions offers were made to release the goods to the respondents upon terms which were not accepted. This circumstance has led to a special contention which is made only in this case. The Halle sailed from Bunbury, Australia, for London, via the Cape of Good Hope. The Halle passed the Cape of Good Hope on Aug. 18, 1939, and, on a normal voyage, she would have reached London about Sept. 16. Instead of proceeding to London, the Halle put into Bissao, Portuguese Guinea, on Sept. 6, and remained there until Oct. 13, when she sailed, and three days later scuttled herself in the presence of a French warship and was lost with all her cargo. It is obvious that the German master in each of these cases determined to obey the instructions of the German government and ceased to hold the goods as the bailee of the assured—namely, in the case of the Minden at Rio, in that of the Wangoni at Vigo, and in that of the Halle at Bissao. Sailings from these three ports were plainly sailings by the masters acting in obedience to orders of the German government. At no time was any notice of abandonment given by the respondents to the underwriters, and no additional premium in respect of any deviation or change of voyage was ever tendered or paid. The appellants, however, do not desire to found any argument on the absence of notice of abandonment and are willing to treat these cases as if such notices were given at any relevant time or times before the actions were begun.

The policies are not precisely in the same terms, but the differences for present purposes are not material. Taking the Minden policy as the exemplar, the insured perils include :

> . . . men of war, enemies, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people . . . and all other perils losses and misfortunes that have or shall come to the hurt detriment and damage of the said goods and merchandises.

This ancient list of perils is brought up to date by the first of the Institute War Clauses, which says :

> This policy covers . . . loss of or damage to the property hereby insured caused by (1) hostilities, warlike operations . . . (2) mines, torpedoes, bombs or other engines of war.

Lastly, there is the so-called frustration clause :

> This policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power.

The frustration clause is precisely the same in all three policies, and it is on the true construction of that clause that the main argument for the appellants has been rested.

My Lords, the appellants in substance raise three points on this appeal. First, they say that all three claims are barred by the frustration clause. Secondly, they contend that, even if this is wrong, they are entitled in all three cases to an additional premium for deviation or change of voyage. Thirdly, they say that in the case of the Wangoni there was no constructive total loss of the goods, or, alternatively, no such loss by perils insured against within the terms of the Marine Insurance Act, 1906, s. 60.

It was also argued that in all three cases (though, apart from the frustration clause, constructive loss of the adventure was admitted) it had not been established that there had been (apart from all other points) a constructive total loss of the goods before the underwriters had ceased to be on the risk either by reason of the constructive total loss of the adventure or for some other reason. This point failed before the trial judge and in the Court of Appeal. Anything further which was said on the point in the very careful argument before your Lordships will be dealt with in the opinions of my noble and learned friends LORD WRIGHT and LORD PORTER, to which I cannot usefully add anything.

It was not contested before your Lordships that in the three cases, but for the frustration clause, there would have been a constructive total loss by loss of the insured voyage or adventure, but, as I understood the argument, it was contended that, in the events which happened, there was a loss of the adventure when the German masters departed from the insured voyages and started to obey the orders of the German government, and from that time, it was said, the risks were at an end, so that subsequent loss of the goods would not expose the appellants to liability. I think it may be useful to consider the precise meaning of the technical phrase "loss of adventure," and incidentally to explain why it is that, in the case of a policy on goods in normal form, the owner can claim either for loss of goods or for loss of adventure, whilst, in the case of a policy on the ship, the underwriters are liable only on loss of ship, and not in respect of loss of adventure.

It is well-known that, until the end of the sixteenth century, marine insurance was carried on in this country mainly by aliens, natives of countries where marine commerce had long flourished, and that the earliest legislation on the subject comes from Genoa and Florence. Your Lordships will pardon me for mentioning that a curious sidelight on this circumstance may be found in the word "argosy," so often used by Elizabethan writers, for, according to the dictionaries, it is said to be derived from the Italian *ragusea*, *i.e.*, a ship belonging to Ragusa, the great medieval port on the Adriatic. An account of the origin of the contract of marine insurance will be found in HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. 8, p. 274 *et seq.* That passage refers the reader to an interesting and learned work called BEUSA'S HISTOIRE DU CONTRAT D'ASSURANCE AU MOYEN AGE (translated from the Italian by Valery, Paris, 1897). From this, and from other books, it appears that from the first the contract of marine insurance was one of indemnity, and that the insurance was generally for a voyage by a prescribed route. It is stated that, as regards goods, it often happened that it was necessary to tranship the goods to another vessel, particularly, it is said, in cases where the goods were bound from a Mediterranean port to an ocean port and the ship in which the voyage began did not travel beyond Cadiz or Lisbon. Since it was not possible, in such cases, to state the name of the ship in which the goods were to arrive, it became usual, as regards goods, to treat the risk as continuing until the goods had been unloaded at the port of destination. Moreover, it is clear that in many cases a merchant sending goods from the Adriatic to, say, a British port would suffer grievous loss if the goods were unloaded at another port on the Adriatic. At a very early date, this was held to justify a claim described as for "loss of adventure" or some similar phrase. There was published at Rouen about 1600 a little book called LE GUIDON DE LA MER, which contains some forms of marine policies then in use and a general account of marine insurance. In Chapter 7 there are descriptions of a total loss entitling the insured to abandon. One example is :

> If the damage exceeds *half the value of the thing, or if the voyage be lost* ; or so disturbed that the pursuit of it is not worth the freight.

The italics are mine. This passage certainly does not support the view that the goods are not insured apart from the voyage, and it is interesting to note that it was cited by LORD MANSFIELD in *Hamilton* v. *Mendes* (2). See also *Goss* v. *Withers* (3), in which LORD MANSFIELD explains the commercial considerations on which the doctrine of constructive total loss is founded.

It is clear that the position of underwriters in regard to a policy on a ship is entirely different from that of the owner of merchandise. The ship is essentially mobile. In olden days, it might often be carried by the winds to a port far from the one intended, the situation of which, indeed, might depend on the the courage, skill or discretion of the master. Nor would the shipowner necessarily suffer loss by reason of the ship not completing the intended voyage but reaching some other port. It is easy to see how many difficult questions would have arisen between underwriters and assured if the policy had been treated in the usual case as extending to an indemnity in respect of loss of adventure. It is now well-settled, contrary to the opinion of LORD MANSFIELD in *Milles* v. *Fletcher* (4), that the loss of the voyage has nothing to do with the loss of the ship.

Returning to the case of a marine policy relating to goods, it seems to me that, putting aside for the moment the technical terms which have long been in use, the policy in its essence is a contract by the underwriters to indemnify the assured either for losses (total or partial) of the goods themselves or for losses he may sustain by reason of the goods not arriving in safety at their destination though the goods themselves are in safety and uninjured, and in either case as a direct consequence of one of the perils insured against : see, for a very similar statement, the judgment of LORD READING, L.C.J., in the Court of Appeal in *Sanday & Co.* v. *British & Foreign Marine Insurance Co.* (1), at p. 811. If that is correct, I am quite unable to see why the respondents in the present case should not be able to claim indemnity simply on the basis of loss of goods, and as if the doctrine of loss of adventure had never been accepted as part of our maritime law. The contract is an insurance against loss of two different kinds in relation to the goods. The first involves loss or damage to the goods themselves. The second involves merely that they have not reached their destination, though they may be perfectly safe. The frustration clause, in my opinion, is free from ambiguity. It relieves the underwriters in the cases we are dealing with from liability under the second head, but it leaves their liability unaffected as regards cases under the first head, provided, of course, that the risk has not come to an end. The trial judge, misled, I think, by a somewhat incautious statement by that very experienced judge, BAILHACHE, J., in *Sanday's* case (1), at p.

784, repeated without comment in the Court of Appeal by SWINFEN EADY, L.J., at p. 819, took the view that what was insured by a marine policy was merely the adventure. This, with all respect, was a mistake. Both as a matter of history and of commercial good sense, the main and primary subject of the insurance on goods under such a policy is the goods as tangible chattels. The liability for loss of adventure is one of a somewhat artificial character, and it appears to have been added to the indemnity in respect of loss of, or damage to, goods by perils insured against. I can find no trace, in any of the old works, of authority for the view that a claim for loss of goods has in the past been regarded as a special kind of claim for loss of adventure, and such a view (as was forcibly pointed out in the Court of Appeal) would lead, if logically pursued, to very strange results. Nor can I find anything in PHILLIPS ON LAW OF INSURANCE or in ARNOULD ON MARINE INSURANCE which supports that view. Historically, it is reasonably clear that the goods were first the subject-matter of the insurance and that then the loss of the voyage came to be regarded as involving a (constructive) total loss of the goods, provided there was an abandonment in due time : see *Barker* v. *Blakes* (5), at p. 294, where ELLENBOROUGH, C.J., explains his view of loss of voyage.

My Lords, it is beyond dispute that the frustration clause was introduced into Lloyd's marine policies shortly after the decision of this House in *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday* (*Samuel*) *& Co.* (1). That, however, was a case where the cargo-owners were compelled to base their claim on " loss of voyage." That followed from the circumstance that the British ships concerned were in substance compelled, after the outbreak of war in 1914, to abandon the contract voyage and to proceed to British ports. In fact, the cargo-owners warehoused the goods in England and gave notice of abandonment. This no doubt leaves open the argument that the frustration clause is so framed that it applies in the present cases as well as those cases, but the history of the clause does not itself suggest a ground for holding it to have been designed to protect the underwriters against a wider risk than that which occasioned their liability in *Sanday's* case (1)—namely, against the risk of claims for loss of goods caused by restraints of princes as well as for claims based upon loss of the insured voyage so caused. (I shall call this the wider effect.) The first thing which occurs to one is that it would have been exceedingly easy to draft the clause so as undoubtedly to have this wider effect if that had been the intention. Next, if the matter is left in doubt, the clause must be construed *contra proferentes*, plainly, in this case, the underwriters. It might be sufficient, in the circumstances, to leave the problem here ; but further examination of the clause seems to show that it is deliberately framed so as to have the narrow construction. For my part, I attribute some importance to the fact that the clause is limited to claims " based upon " the loss of, or frustration of, the insured voyage. The words in their natural meaning point to the way in which the claims are framed and cannot easily be read as extending to claims which might

truly be said to be occasioned by the loss of, or frustration of, the adventure,
but are really based upon loss or damage to the goods themselves.
I agree, however, that the important words are "the loss or frustration of
the insured voyage."

I do not take the view that the insurance had come to an end before A
the loss in each case occurred, but I am aware that some of your Lordships
are dealing exhaustively with this point, and I shall merely state very
shortly that I agree on the same grounds. The deviation of route to
Santos and Rio in the case of the Minden was, I think, excused by sect. 49
(1) (*b*) of the Act as being caused by circumstances beyond the control B
of the master and his employer. It was not the voluntary act of the
master: compare the analogous position in *Sanday's* case (1). The
subsequent change of voyage was not, within the terms of sect. 45 of the
Act, "a change of voyage discharging the insurer from liability," for the
reason that the destination of the ship was not *voluntarily* changed, since C
the master was acting on orders which he was at least morally bound to
obey: *Phelps* v. *Auldjo* (6). There being neither a change of voyage
within sect. 45 nor a deviation other than one which was permissible, no
extra premium was payable. The same considerations apply in substance
to the Halle and the Wangoni. There was in each case a loss to the D
assured of his goods by restraint of princes, either when the master of the
ship set out for a German port in pursuance of the German government's
orders or, it may be, before: *Robertson* v. *Petros M. Nomikos, Ltd.* (7),
per LORD WRIGHT, at pp. 382, 383, and *per* LORD PORTER, at p. 391.

Taking the view I do of the twofold nature of a marine insurance on E
goods, I am unable to accept the argument that the respondents are
precluded from claiming in respect of the loss of goods as chattels by
restraint of princes because the same event might have justified, but for
the frustration clause, a claim based on a loss of the insured voyage or
adventure. The same peril affected two different aspects of the subject- F
matter, and one of these, the goods themselves, is not affected by the
frustration clause. I agree with the judge and the Court of Appeal in
thinking that in the cases of the Minden and the Halle it was "unlikely"
(using the word employed in sect. 60 (2) (i) of the Act) that the assured
could recover their goods. Their losses were in fact converted into actual G
total losses by the subsequent scuttling, and whilst the goods were still
covered by the policies: *Mellish* v. *Andrews* (8). Apart from this,
however, I am of opinion that the owners were unlikely to recover the
goods after the time when the orders of the German government were
acted upon, and that the goods then became constructive total losses H
and might have been "reasonably abandoned" (sect. 60). As regards
the Wangoni, I can see no essential difference in that case except as
regards the suggestion of discharge of the goods at Vigo. My noble and
learned friends LORD WRIGHT and LORD PORTER are about to deal with
that aspect of the case. I could not adequately state my view of the
correspondence relative to the suggestion except at some length, and I

think it sufficient to say that I entirely agree with the opinions which they will express in relation to it and to the subequent events attending the Wangoni after it reached Hamburg. I agree, therefore, in all three cases, with the Court of Appeal, and am of opinion that the three appeals should be dismissed.

Lord Thankerton: My Lords, as I find that the opinion of my noble and learned friend Lord Porter, which I have had the privilege of considering, expresses the views which I have formed in these three appeals, I find it unnecessary to do more than express my concurrence in that opinion.

Lord Wright: My Lords, these three separate appeals were heard together. The cases were chosen as test cases to obtain the guidance of the court on questions of principle which had arisen as to the effect of policies of marine insurance issued by British underwriters on goods the property of British subjects which were, at the outbreak of war, being carried on German vessels to British or colonial ports. The question arose because the German masters, acting under orders of the German government, had at first put into neutral ports, had then proceeded to make for Germany, and either had, as happened in two of these three cases, been scuttled when intercepted by British or allied warships, or had, as happened in the third of the cases, succeeded in evading the blockade and in reaching a German port with the goods on board. The policies under which the goods were insured on the particular voyages covered, *inter alia*, war risks, but subject to an excepting clause, conveniently referred to as the frustration clause, the terms of which were that the underwriters were warranted:

> . . . free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power.

The trial judge, Hilbery, J., held that the assured had succeeded in establishing in each case a constructive total loss of the goods, but that the underwriters were entitled to judgment because they were relieved from liability by the frustration clause. This decision was in each case reversed by the Court of Appeal, and the several underwriters were held liable. They now appeal from these decisions to this House. There were other questions involved, but the principal question was as to the construction of the frustration clause.

Though the three cases raised the same general principle, there were differences between them which, your Lordships were told, had led to the selection of three test cases, instead of one. I think it best to follow the course adopted in the court below, and deal with each case separately, in the order in which they appear in the list. I shall examine the general questions at some length in considering the first appeal. In the other two appeals, it will then be enough to deal with the special features which they present.

In the first appeal, which I shall refer to as the Minden, the respondents, the Forestal Land, Timber and Railways Co., Ltd., insured with the appellant underwriter Edward Rickards a quantity of quebracho wood extract shipped by the respondents on the Minden, a German vessel, at Buenos Aires under a bill of lading dated Aug. 16, 1939, for Hong Kong-Shanghai option and including transhipment at Durban. The policy was against the usual risks and included war risks, but was subject to the frustration clause. The bill of lading contained wide liberties to deviate, which were incorporated in the policy. The Minden sailed from Buenos Aires, with Durban as her first port of call, towards the end of Aug., 1939. She should normally have reached Durban about Sept. 5, 1939, but, having turned northwards off her course, reached Santos, in Brazil, on Aug. 24, 1939, and sailed again on the same day for Rio, where she arrived on Aug. 25, 1939. She left Rio on Sept. 6, 1939, and on Sept. 29, 1939, she was scuttled by those on board off the Faroe Islands, in the presence of a British warship. All her cargo, including the respondents' goods, was lost.

A statement of facts was agreed, and it was also agreed that the court should have liberty to draw inferences of fact. The material facts agreed (in addition to those already stated) were that on and after Sept. 3, 1939 (when war broke out), there was risk of capture whenever the Minden was outside territorial waters of any neutral state, that as from that date there was an effective blockade of all German ports by the British and French naval forces, which were further taking all possible steps to intercept, capture and destroy all German vessels on the high seas, that at all material times the German government, in furtherance of German war policy, had taken control of all German-owned merchant vessels and had given orders to all such vessels and their masters to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels, and that at no time was notice of abandonment given by the plaintiffs to the defendant or other underwriters, and no additional premium in respect of any deviation or change of voyage was ever tendered or paid. The judge drew certain inferences of fact, which have not been contested. These are in substance that the master of the Minden, having the orders of his government in hand, decided to go to Rio *via* Santos and there wait to see if war came, and that the master's intention was to stay at Rio for a while (the pre-war crisis then being at its height), and, if war did break out, to make his decision then either to stay there or to go back to Germany, running the British and French blockade if he could, or, if not, to scuttle the ship. The judge was of opinion that there was a constructive total loss when the master did the overt act of sailing from Rio after the outbreak of war in obedience to the orders of his government, and that the loss was a loss by restraint of princes. He said ([1940] 4 All E.R., at p. 101) :

> The acts of the master in thus restraining the plaintiffs' goods in the ship were done in obedience to the paramount orders of the government to which he owed

> allegiance. In doing the acts, he was not acting for himself or his owners. He was the agent of the German government. His act [was their act.]

The judge also found that it was more unlikely than not that the plaintiffs would recover the goods after the vessel sailed from Rio, but he held that, though there was a constructive total loss when the ship sailed from Rio, the appellants were relieved from liability by the frustration clause. As to the alternative claim for an actual total loss when the vessel, with the goods on board, was scuttled, he held that the respondents could not recover, because the underwriters were not on the risk at that time. At Rio, he held, the insured adventure had been entirely abandoned. The constructive total loss which, as he held, occurred at that stage was not, in his judgment, recoverable, because it was barred by the frustration clause. Thus, the respondents had, on the judge's view, no claim under the policy. The Court of Appeal were of opinion that the constructive total loss which they, like the judge, held had occurred at Rio was not excepted by the frustration clause. Accordingly, they decided that the respondents were entitled to succeed in their claim. The appellant underwriter did not in either court rely on the absence of notice of abandonment.

It was in both courts, in my opinion, rightly held that the act of the master in sailing from Rio constituted a restraint of princes within the words of the policy :

> . . . capture, seizure, arrest, restraint or detainment, also the consequences of hostilities or warlike operations.

These words were intended to repeat the words printed in the body of the policy :

> . . . enemies . . . takings at sea, arrests, restraints and detainments of all kings, princes and people . . .

It is also clear that it is this peril or class of perils which is dealt with in the frustration clause. Diversity of expression in respect of the same matter is common in marine insurance policies. It is notorious that a policy of marine insurance is in many ways an obscure, loosely-drawn, and inaccurate instrument, if I may quote from the language of such judges as LORD MANSFIELD, MARSHALL, C.J., in the United States, BULLER, J., and others. The form of the modern policy has grown up on the basis of the traditional policy, the origin of which dates back to the middle ages. The particular policy in question here, which is in fact simply a policy on goods, states that it is also upon :

> . . . the body, tackle, apparel, ordinance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the Minden.

However, no one attends to these words, because everybody knows that it is the goods which are insured. The policy is further complicated by the practice of adding clauses, and also of superimposing attached slips, all of which may have to be taken into account. At the same time, it must be remembered that the uncertainties and obscurities in the policy may be largely attributed to the subject-matter. As is said in PHILLIPS ON LAW OF INSURANCE (Boston, 1867), Vol. I., p. 5 :

> A contract embracing so many interests and parties and liable to be affected by so many events cannot but be subject to some difficulties of construction, however carefully it may be drawn.

In England, the codifying Act, the Marine Insurance Act, 1906, has done much to simplify the law, but it would be an insufficient guide were it not supplemented by the decided cases. Indeed, sect. 91 (2) in terms provides that:

> The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

The Act is merely dealing with a particular branch of the law of contracts—namely, those of marine insurance. Subject to various imperative provisions or prohibitions and general rules of the common law, the parties are free to make their own contracts and to exclude or vary the statutory terms. The object both of the legislature and of the courts has been to give effect to the idea of indemnity, which is the basic principle of insurance, and to apply it in the diverse complications of fact and law in respect of which it has to operate. In this way, the law merchant has solved, or sought to solve, the manifold problems which have been presented by insurances of maritime adventures.

The definition of restraints of princes in r. 10 of the first schedule to the Act is not very helpful in this case, but it does define the peril as including executive acts. Was what the master did an executive act of the German government? I think that it was. Arrests of kings, princes and peoples are generally carried out by commissioned officers in the naval or other employment of the particular state, and generally involve some exercise of force, or at least the threat of a force locally present though in the background. What happened here was that the master, being in possession of the goods as a carrier for the respondents, seized them in the sense that he ceased to hold them as carrier and changed the character of his possession by taking and controlling them as agent for the German government, with the intention and effect of holding them adversely to the respondents and applying them to the hostile purposes of his government. In doing so, he deprived the respondents of them. The courts below have rightly fixed the overt act of hostile seizure as being committed when the master sailed from Rio. His act could not be regarded as piracy, because he did it on express orders from his national government. Nor could it be called barratry, because it must be assumed that his owners were equally with himself sympathetic with, or subject to, the orders of the German government. That an enemy subject may commit an act of hostilities for his government in a foreign country, even without express orders, was illustrated by *Atlantic Mutual Insurance Co.* v. *King* (9), where during the last war a German was found to have placed an infernal machine in the hold of an English ship in New York harbour with the purpose and effect of damaging her cargo when it exploded. He was held to be an agent of the enemy, because, as BAILHACHE, J., held, at p. 313:

> . . . knowing that the settled and concerted policy of that government is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy.

This is an even stronger case, because, when the master took control of and seized the goods, he did so on express orders. It is also clear that a restraint may operate without any display of force. The master was actually in possession of the goods throughout. He simply took them from the respondents by dealing with them adversely to their interests and throwing off the role of a private carrier, in which capacity he had held them up to then as bailee for the appellant. The restraint which was operating on the master was the compelling force of the German state, to which he was subject. In one sense it was a moral compulsion, but in another sense it was more. It may be assumed that he was aware that, if he had disobeyed the order, his government had means of vindicating their authority, if not at the moment, at least subsequently. In *Miller* v. *Law Accident Insurance Co.* (10), the master, in obedience to a sanitary order of the Argentine government, after arrival at Buenos Aires, the port of destination, took cattle out of the port and abandoned the adventure. Though no actual force was used or displayed, the order of the Argentine government had behind it the power of the state. In *Becker, Gray & Co.* v. *London Assurance Corpn.* (11) LORD SUMNER thus sums up the situation, at p. 115 :

> STIRLING, L.J., expressly says that the captain did not act voluntarily. The frustration of the adventure was caused by the direct operation of an order which, was an act of state and was backed by the existence of available force though its employment proved to be unnecessary.

There, it is true, the vessel had actually come within the area of compulsion, whereas in this case Rio was a neutral port outside the territorial sovereignty of the German government. I do not regard that as a material distinction in a case like this.

There is perhaps no exact counterpart in the books, but a close analogy is presented by *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday (Samuel) & Co.* (1). There masters of British vessels carrying British goods to Hamburg, in the first days of Aug., 1914, when in, or approaching, the English Channel, were informed of the outbreak of war, whereupon they abandoned the voyage to Germany and were diverted to British ports. It was held that there was a loss of the goods by restraint of princes. In that case, the concise summary of the decision of this House by EARL LOREBURN is very apposite to the present question. He said, at p. 658, that on the outbreak of war trading to German ports became unlawful, and an instant duty arose for those two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence, and in fact impracticable. This does not, indeed, afford a strict parallel. The restraint there invoked was that of English law in its operation on British subjects, but it shows that there may be a restraint, though the physical force of the state concerned is not immediately present. It is enough, I think, that there is an order of the state, addressed to a subject of that state, acting with compelling force upon him, decisively exacting his obedience and requiring him to do the act which effectively restrains the goods. Thus the seizure or restraint effected in obedience to that order becomes the belligerent act of the German government, though it is committed by the master of a German merchantman on the high seas or in neutral territory.

I may here deal with the question of the deviation of the vessel when she left the contract voyage to go first to Santos and then to Rio, and waited at Rio until Sept. 6, 1939. It is clear that the master made the deviation as a precautionary measure, in obedience to the orders to take refuge in a neutral port, when the imminence of war became apparent. This was clearly in furtherance of German war policy and under German government control. Thus, it was not the voluntary act of the master, any more than it was in *Sanday's* case (1) or *Miller's* case (10). It was the direct effect of the restraint. As to the change of voyage, the acts of the masters were equally not voluntary. The deviation thus comes within the protection of sect. 49 (1) (*b*) of the Act, which enacts that deviation is excused, *inter alia*, where it is caused by circumstances beyond the control of the master and his employer. Here the deviation was caused by circumstances beyond the control of the master, who was, as already stated, bound to obey the orders of his government equally with his employer, the German shipowner. The deviation was certainly beyond the control of the assured, if that is material. It may be doubted if, at any time before the actual outbreak of war, there was a change of voyage, but there was a change of voyage when the vessel sailed from Rio on the voyage or adventure to run the blockade on the orders of the German government. That change of voyage was certainly not voluntary. On that ground, therefore, it could not be said that the insurer was discharged from liability under sect. 45 (2) of the Act, because the change of voyage which discharges the underwriter is defined in sect. 45 (1), and the definition includes the element that the voyage is voluntarily changed. I accordingly see no reason why recourse should be had to the "held covered" clause in the policy, or to the bill of lading liberties, though these are sufficiently wide, and are, in this case, incorporated in the policy. The change of voyage was an act and part of the hostile seizure.

I now turn to consider whether this operation of the insured perils caused a constructive total loss of the goods, as HILBERY, J., and the Court of Appeal have held. *Prima facie*, once it is accepted that there has been a seizure or capture of the goods, there is, as was said in PHILLIPS ON LAW OF INSURANCE, Vol. 2, p. 319 :

> . . . the right of abandoning immediately ; and this right subsists so long as the property is detained by the captors or by their government, whether in port or at sea.

Here there was a capture or seizure of the goods by the German government acting through the master, and the seizure or capture continued until the ship was scuttled. However, a more careful examination of the doctrine of constructive total loss, as set out in the Act, is here necessary in order to deal with the decision of the judge on the frustration clause and the exhaustive arguments addressed to your Lordships by counsel for the appellants.

The concept of constructive total loss is peculiar to marine insurance. Its main characteristics are now defined in sect. 60 of the Act. Subsect. (1) provides as follows :

> Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

Subsect. (2) says :

> In particular there is a constructive total loss
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered . . .

I need not here quote the rest of the subsection. It has been observed that this section raises great difficulties of construction. That is perhaps inevitable, and is certainly excusable when it is sought in a brief section, supplemented though it is by sects. 61 to 63, to embody the complicated problems of law and fact which experience has shown to arise in the case of a constructive total loss. Some aspects of the section have been recently discussed in this House in *Robertson* v. *Petros M. Nomikos, Ltd.* (7). In particular, the difficulty of fitting together the two subsections of sect. 60 and reading them together with sect. 61 was there considered. I think the view which this House arrived at was that the two subsections contain two separate definitions, which may be applied to different conditions of fact. Thus, an assured can base his claim on the terms of subsect. (2), which give an objective criterion in each case, ship, goods or freight, not only more precise than, but substantially different from, that in subsect. (1). Subsect. (2), as compared with subsect. (1), is thus additional, and not merely illustrative. In the present case, the assured rely on subsect. (2) (i) and say that they were deprived of the possession of the goods by a peril insured against, and that it was unlikely that they could recover them. This, however, raises a number of questions. First, what is the point of time to be taken in ascertaining where there was a constructive total loss ? A constructive total loss is a device intended to subserve the purpose of indemnity by enabling the assured, when by insured perils the postulated danger of loss or deprivation is caused, to disentangle himself, subject to definite limits and conditions, from the danger and throw the burden upon the underwriters. If the assured elects to avail himself of this option, he must do so by giving notice of abandonment within a reasonable time after the receipt of sufficient information. He is not allowed to await events to see how things turn out or to decide what may best suit his interests. If he duly elects to abandon on good grounds, the risk is ended, because the assured can recover as for a total loss, and the salvage vests in the underwriter. By the English common law, the date of giving notice of abandonment was not treated as the decisive date, which was taken to be the date of issuing the writ in the action. This was fully established by a number of authorities dating back at least to the time of LORD MANSFIELD. These authorities were collected by COLLINS, J., in *Ruys* v. *Royal Exchange Assurance Corpn.* (12). The Marine Insurance Act, 1906, is silent on the point, and this has led to some question, which VISCOUNT SUMNER in *Captain J. A. Cates Tug & Wharfage Co.* v. *Franklin Insurance Co.* (13), at p. 703, found it unnecessary to consider. However, in *Polurrian S.S. Co., Ltd.* v. *Young* (14), where, in the changing circumstances, it was material to determine what was the material date at which the justification for giving notice of abandonment was to be judged, the Court of Appeal accepted the date of the commencement of the action. They thus held that the Act had not changed the old rule. In my opinion, this was the sound conclusion. Sect. 91 (2) requires that the express provisions of the Act should be inconsistent with the old rule if the old rule is to be abrogated. I cannot find any such inconsistency in sect. 60 or sect. 61, or elsewhere in the Act. The law of Scotland is different on the point, and weight has been attached in some quarters to the fact that the draft of the Act was changed by omitting a section which expressly provided that the date of the writ should be the material date. However, I do not appreciate how this can properly affect the construction of the actual words of the Act. The old rule is, I think, still the law. This point appears to me to be material in one of these appeals. As will appear, the question of the appropriate date is blurred in all these appeals by the fact that no notice of abandonment under sect. 62 was ever given. It was waived by the appellants under sect. 62 (8), so that, as I think, the assured can claim to fix the date of the notice at any time which suits him. As to the dates of the actions, they were in each case subsequent to the total loss of the goods, and, so far as that goes, the assured can rely on that date, if he requires to do so, in these actions.

I must next consider the meaning of the words "subject-matter insured" in sect. 60 (1) or "goods" in subsect. (2). Any controversy as to the meaning has been settled by this House in *Sanday's* case (1). In the words of EARL LOREBURN, at p. 657:

> ' There are many things that may be at risk, and in respect of which insurance may be effected, ship, goods, freight, profits, and so on. There are also familiar, and even antique, expressions constantly used from long ago in marine policies, and continued because they are well understood in the business or have been interpreted by judges. This section [sect. 26] says that regard is to be had to any usage regulating the designation of the subject-matter assured. The words of this policy have for generations been understood and held by judges to designate not merely the goods, but also the adventure. So far from abrogating this designation of subject-matter I should have thought the Act took pains to preserve it and others like it.

In that case, EARL LOREBURN also referred to sect. 91 (2). In the Court of Appeal, SWINFEN EADY, L.J., dissenting, had taken a more narrow and formalistic view of the word "goods," treating it as limited to the physical objects, but his reading of the word was rejected. I must revert to this matter when I consider the effect of the frustration clause.

The word " unlikely " did, however, involve a change in the old law. This matter was discussed and decided—rightly, as I think—by the Court of Appeal in *Polurrian S. S. Co., Ltd.* v. *Young* (14). The insured steamer had been captured by the Greek government while it was carrying contraband of war during the war between Greece and Turkey in 1912. The captor took the contraband cargo out of her and put the vessel into the Prize Court. However, the innocent carriage of contraband is not generally regarded, according to international law, as involving the condemnation of the vessel. The master denied that he knew that war was on foot when he was carrying the goods, but, at the date of the issue of the writ, his innocence was contested by the captors. It was, therefore, at that date " uncertain " if she would be released. At the date of the trial, she had been released. It was held that, while it was " uncertain " whether the assured would recover the vessel within a reasonable time, it was not on all the facts " unlikely " that they would do so. KENNEDY, L.J., in his judgment, quoted the authorities and stated the law before the Act to have been that, if the taking of the vessel out of the owner's possession was, at the date of the commencement of the action to enforce his claim, a taking which still continued in operation and the owner's loss of the use and disposal of the vessel, once total, was, at that date, one which might be permanent, and was at any rate of uncertain continuance, the owner, who had duly given notice of abandonment, was by English law entitled to recover upon his insurance for a constructive total loss, even though he had, at the date of the trial, recovered the subject of the insurance. The underwriter had to pay as for a total loss, but took the recovered subject as salvage. KENNEDY, L.J., [p. 936] found it difficult to reconcile the words " reasonably abandoned on account of its actual total loss appearing to be unavoidable " in sect. 60 (1) with the words " unlikely that he can recover the ship," but, taking the latter as the true test in the particular case, held that the statute had modified the pre-existing law to the disadvantage of the assured. I agree with that conclusion. There is a real difference in logic between saying that a future happening is uncertain and saying that it is unlikely. In the former, the balance is even. No one can say one way or the other. In the latter, there is some balance against the event. It is true that there is nothing in the Act to show what degree of unlikelihood is required. If, on the test of uncertainty, the scales are level, any degree of unlikelihood would seem to shift the balance, however slightly. It is not required that the scale should spring up and kick the beam.

In the present case, in my opinion, it was unlikely that the goods would be recovered. The odds were all against it. When the Minden sailed from Rio under the orders of the German government, it was, I think, not merely uncertain that she would evade the British blockade. It was, in my opinion, unlikely. If she had been captured, it was no doubt likely that the assured would have regained possession of his goods, but the orders of the German government had provided against that contingency by requiring the master to scuttle the ship, as he in fact did. No doubt the peril which would in that event have caused the loss was, strictly speaking, not arrests or restraints, but scuttling by hostile action, which would fall A within the word "enemies" in the policy. Since *Samuel* (*P.*) *& Co.* v. *Dumas* (15), the loss could not be described as a loss by perils of the seas. If, on the other hand, she ran the blockade and reached a German port, the assured would presumably be irretrievably deprived of his goods, which is an actual total loss. Counsel for the appellants strenuously B contended that, if there was a constructive total loss, which did not give the respondents a claim because it was one for which, in virtue of the frustration clause, the appellant was not liable, all possible claims under the policy were excluded, even though in the end the goods were totally lost by an insured peril. This argument found favour with the trial C judge. It led MacKinnon, L.J., to some severe strictures on the futility of such an insurance, or pretended insurance, against war risks, and on its utterly unbusinesslike character. I agree with these strictures, but, with all respect to the judge, the arguments are based upon a misconception, quite apart from the effect of the frustration clause. If the sailing from D Rio under the orders of the German government did not give a claim to a constructive total loss because, for instance, there was no proper notice of abandonment, still the insurance continued. As I have explained, the policy was not avoided by the deviation or change of voyage. The property in the goods still remained in the respondents and was still E covered by the policy. A failure to establish a constructive total loss does not in general prevent a later claim for an absolute total loss if changed circumstances justify it. This principle is illustrated by many reported cases and is clearly just and logical. I may refer, as an illustration, to *Stringer* v. *English & Scottish Marine Insurance Co.* (16), where, F on a capture, the assured had not elected to abandon, but later, when the capture had been followed by a sale of the ship, they were held entitled to recover as for an absolute total loss, as to which there was no necessity to give notice of abandonment. Blackburn, J., in delivering judgment, at p. 690, quoted the words of Lord Abinger, C.B., in *Roux* v. *Salvador* G (17), at p. 287:

> The underwriter is not the less liable upon his contract because the assured . . . has postponed his claim till that event of a total loss has become certain which was uncertain before.

A more recent illustration is afforded by *Woodside* v. *Globe Marine* H *Insurance Co.* (18), where a ship had stranded but was still capable of being floated and repaired, though at a price exceeding her repaired value. Thirty-six hours later, she was completely destroyed by fire. The plaintiffs claimed for an absolute total loss by fire, which, as well as sea perils, was covered by the policy. Mathew, J., in deciding in favour of the assured, said, at p. 107:

> The loss by stranding would only become total if the assured gave timely notice of abandonment. If none were given, the loss would be a particular average, and it would seem clear law that a particular average loss, however serious, could not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation.

A I have referred to the question of absolute total loss, partly out of respect to the judge and to the arguments of counsel for the appellants, but also because in the next case, the Wangoni, it may seem material, as I think it was treated as being in the judgment of SCOTT, L.J. However, this case has proceeded on the basis of a constructive total loss when the B ship sailed from Rio. The loss was never reduced or adeemed. Notice of abandonment was waived by the underwriters, and, in any event, the vessel was finally lost before the assured knew what had happened or could abandon, so that notice of abandonment was unnecessary under sect. 62 (7) of the Act. The only possible answer on this basis is the C frustration clause. The appellant succeeded on that clause before HILBERY, J., because of that judge's view that what was insured was the adventure alone. In his own words, the subject-matter of the insurance is the adventure of the goods on the voyage. The goods, he said, are not insured apart from the voyage. It is the voyaging with the goods or the D goods upon the voyage which is the subject-matter of the insurance. If, however, these words are compared with the language of EARL LOREBURN in *Sanday's* case (1), at p. 657, quoted above, the fallacy, I think, will be clear. The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival E of the goods. This is very old law. LORD MANSFIELD insisted on applying the same rule to an insurance on a ship, but his view was rejected, and it was said that the loss of the voyage has nothing to do with the loss of the ship. The ship is a vehicle employed in general trading, not wedded to any particular adventure. Freight also is regarded in ordinary F practice as a separate interest capable of being separately insured in addition. As to goods, it is indeed true that profits can be separately insured by an appropriate policy, and also that the insurable value on goods under an open policy is their value plus charges on shipment, not their arrived value (sect. 16 (3) of the Act), but it has long been recognised G that, in a valued policy on goods, it is permissible—and, indeed, usual—to value the goods so as to exceed their value on shipment. This practice is recognised by ARNOULD ON MARINE INSURANCE, sect. 343, where reliance is placed on the opinions expressed by LORD ELLENBOROUGH, C.J., in *Forbes* v. *Aspinall* (19) and *Usher* v. *Noble* (20). LORD ELLEN-H BOROUGH, C.J., emphasises that goods are generally sent to a profitable market. Thus it is sometimes said that the policy on goods covers also loss of market, because the owner is generally shipping them for sale at a profit. However, the advantage contemplated may be some other purpose of the assured, as, for instance, for use as raw material or machinery for his factory at the destination. I prefer the phrase "loss of the adventure." It follows that a policy on goods is in truth one covering a composite interest, the physical things or chattels and also the expected benefit from their arrival. The subject-matter may be described as chattels-cum-adventure. It seems to follow inevitably that, if the goods are lost, the adventure is lost also. If they are damaged and suffer a partial loss, the adventure may or may not be lost. However, the A adventure may be lost even though the goods are neither damaged nor lost nor taken from the assured's possession or control. Such a case was *Sanday's* case (1), where the cargoes were safe on the carrying ships, but the adventure could not be completed because the port of destination had become enemy territory, and hence the adventure of the British B goods owners was frustrated. Another illustration is afforded by *Rodoconachi* v. *Elliott* (21), where parcels of silk, shipped from Japan to London, were detained on their way across France by the investment of Paris by the German armies in 1870. It was held that there was a constructive total loss by restraints of princes, which might extend to an C indefinite time so as " to cause at least a loss or failure of the commercial adventure." In fact, the goods were undamaged and continued in the possession of the assured and their bailees. There was no exercise of dominion over the goods themselves, but the warlike operations restrained the owner from dealing with his goods. It is not necessary to multiply D examples of cases in which the loss claimed was loss of the venture. To cases of that type the frustration clause has a clear and precise application. In my opinion, however, it cannot be applied to a case where the assured is claiming for loss of, or damage to, the actual physical things or chattels. He is entitled to resist the application of the clause on the E ground that the primary subject-matter is the goods, and that the adventure is merely ancillary or accessory. A claim in respect of the loss of the adventure is an added benefit granted to the assured over and above his interest in the goods themselves. The exception is expressly by its language limited to the loss of, or frustration of, the insured voyage or F adventure. Its language cannot, in my opinion, be twisted to make it exclude a claim for actual loss of, or damage to, the goods themselves. Even if I felt any doubt about this, which I do not, I should still say that it is for an underwriter who has undertaken a particular insurance, if he desires to make exceptions from it, to do so in clear terms. An ambiguous exception is no defence. However, I do not think that the exception G is even ambiguous.

Counsel for the appellants sought to support his contention by saying that the case was analogous to one in which there was an exception clause taking particular perils out of the insurance. Here, he said, there was H only one cause operating on the subject-matter at one and the same time, and its effect was excepted. In my judgment, that is not a true analogy. It is true that there is only one subject-matter—namely, the composite subject which I have described as the chattels-cum-adventure. The same peril operating on that subject may simultaneously affect both aspects or ingredients of it just as much as it would if the separate aspects were separately insured, the chattel interest by an insurance on goods and the adventure interest specifically as an insurance on profits. Either policy might then contain its own exceptions. On this analogy, which, if not complete, is sufficient for this case, what I may call the adventure interest is notionally severable from what I may call the goods or chattel interest. It seems clear, on that footing, that it is only the latter which is affected by the frustration clause. The assured can claim for the loss of the goods or things or chattels without being harmed by the frustration clause. This conclusion is fortified by the history of the clause, which was undoubtedly invented from a desire to abrogate the effect of *Sanday's* case (1), where only the adventure was affected by the peril, the goods being unaffected. It would be wrong to construe the clause otherwise than in accordance with its actual language, or treat it as limited in its scope to a case exactly like *Sanday's* case (1), but *Sanday's* case (1) is at least a striking illustration of what the clause aims at. I may add that I attach no importance to the use in the clause of the words "based upon." The clause might just as well have run "for loss of." The material and limiting words are the "insured voyage or adventure," which, as I have explained, is not the same thing as "the goods" described in the policy. In my opinion, the appeal in the case of the Minden should be dismissed.

The next of the three test cases is that of the Wangoni, as I shall call it. The assured, now the respondent, was Middows, Ltd., and the underwriter, now the appellant, was Robertson. That case is in the main analogous to that of the Minden, and what I have already said applies to it. There is, however, one important difference, besides the fact that the vessel succeeded in reaching Hamburg with the goods—namely, that there were suggestions or offers by or on behalf of the German government which would have enabled the assured to recover possession of the goods at a port other than the proper port of destination, subject to heavy payments and under onerous price and other conditions. This circumstance is relied on as showing that it was not unlikely that the goods would be recovered within the meaning of sect. 60 of the Act, and thus excluding a claim for a constructive total loss, or, in the alternative, as preventing the assured from claiming for a total loss on the ground that they might have averted it by coming to terms with the German government and recovering the goods. The Court of Appeal have rejected both these contentions.

A statement of facts was agreed in this case, as in the Minden. The goods consisted of a small parcel of triplex boards covered under a floating policy against war and marine risks, including also the Institute cargo clauses, war clauses and strike clauses. The parcel appears to have been valued at £24 or thereabouts. It was shipped at Bremen on the German vessel Wangoni for carriage to Capetown. The assured and the underwriters were British subjects.

The Wangoni sailed from Bremen with the goods about the middle of Aug., 1939. Her first port of call was Capetown, where, in the normal course, she would have arrived on or about Sept. 12, 1939. On Aug. 29, 1939, however, she arrived at Las Palmas. She sailed from there for Vigo, in Spain, on the same day, and arrived there on Sept. 1, 1939. There she remained until Feb. 10, 1940, at which date she sailed for Hamburg. She reached that port on Mar. 5, 1940. The agreed facts include certain correspondence to which I shall later refer, together with the statement that the assured never paid the sums demanded in the correspondence at Vigo or Hamburg, and did not take the goods on the terms offered at either port. The agreed statement is similar in other respects to that in the case of the Minden, and among other matters states that there was an effective blockade of all German ports, that control had been taken by the German government of all German ships at all material times, and that the same orders as stated in the Minden case had been issued by that government to their masters. HILBERY, J., has drawn certain inferences of fact, in particular that the master of the Wangoni had the orders of the German government in his hands before Aug. 29, and that it was in obedience to those orders that he made the deviation to Las Palmas and then went to Vigo, intending, if war broke out, to wait at Vigo and thereafter to decide what course to pursue. HILBERY, J., could not say with certainty that, before he left Vigo, the master had determined to take the goods back to Germany, though he is certain that he had so determined on Feb. 10, 1940, when he sailed from Vigo for Germany. However, by reason of the correspondence to which I now refer, the judge rejected the conclusion that there was a constructive total loss on Feb. 10, 1940. He disregarded the subsequent voyage to Hamburg and what happened there, because, by the same reasoning as in the Minden case, he held that, when the vessel sailed from Vigo, the subject-matter of the policy was gone, and the goods were no longer at the appellant's risk. The Court of Appeal, in reversing that decision, took the same view as in the Minden case—namely, that the deviation or change of voyage did not terminate the insurance. SCOTT, L.J., seems to put the constructive total loss which he found to have occurred on the ground that, at the start of the deviations, the goods were under restraint of princes, and that the German government, when their orders compelled the master to abandon the commercial voyage, took absolute and unconditional possession of the goods, and thereafter continuously deprived the respondents of their possession until the cargo reached their hands at Hamburg. He does not in terms discuss the correspondence, and, I infer, was of opinion that the constructive total loss, which occurred at latest on leaving Vigo, was merged in an actual total loss at Hamburg. MACKINNON, L.J., was of opinion that at all material times it was certain that the cost of recovering the goods would exceed their value (their insured value being only about £24) when recovered. This appears to be correct, but, of the two views so expressed, I prefer that of SCOTT, L.J. I may also observe that the view of MACKINNON, L.J., might be of little help towards elucidating principles in cases in which the insured value was substantial.

Apart from the correspondence, I think that, when the Wangoni sailed from Vigo, the position here is substantially the same as it was in the case of the Minden when the latter vessel sailed from Rio. The correspondence, however, must now be considered. It starts with a letter of Oct. 4, 1939, from certain brokers at Rotterdam, reporting that the Wangoni, owing to the international situation, had called at Vigo as a port of distress, and offering to deliver the goods at Vigo on certain conditions—namely, payment of full freight (so far as not already paid) and discharging expenses, surrender of the indorsed and receipted bills of lading, and an additional payment of 35 per cent. of the value of the goods for calling at a port of distress. An irrevocable banker's guarantee of 100 per cent. of the value was also to be deposited, perhaps to secure against the contingency that the receipted original bills of lading were not available at Vigo, which might well be the case. However, the whole proposal was to be effective only so far as discharge and delivery were possible, having regard to stowage and other difficulties. This was certainly a somewhat unattractive offer, even if a licence from the Treasury to deal with, and make payments to, an alien enemy was likely to be granted. No doubt such licences were granted in some similar cases, and I shall assume that one would have been granted in this case, though I am far from satisfied that it would have been. The respondents passed the letter on to the underwriters' brokers, who made reply that the assured must act as if uninsured. What the assured did was to make certain inquiries, and eventually no more was heard of the proposition. This does not surprise me. I do not regard this correspondence as changing the opinion which I should have formed apart from it—namely, that there was a constructive total loss when the vessel left Vigo, if not before. I do not think that the correspondence rendered it any the less unlikely that the goods would be recovered. In a question of this sort, it is necessary to examine all the circumstances. It is clear that the insured goods here were the goods embarked on an adventure for carriage to Capetown. Recovery of the goods included recovery both of the goods and of the adventure. It is true that the disability of the carrying vessel to complete the voyage would not necessarily involve a loss (except a partial loss for expenses) so long as transhipment into another vessel was reasonably practicable, but I am not prepared to find that it was reasonably practicable in the present case. There is no specific evidence on the matter, but it is clear that this parcel of cargo was being held on the ship, after the outbreak of war, at Vigo, a neutral port. Assuming that delivery was obtainable from the Wangoni on the onerous terms of the contingent proposal, still it would be necessary, if the adventure was to be completed, to obtain space on a vessel bound for Capetown, or, if that was not possible, for England, for a further transhipment to Capetown. There would be heavy agency charges, heavy expenses of transhipment or transhipments and further freight and other expenses, in addition to the exorbitant payments demanded at Vigo. Besides all that, the proposition was uncertain and hypothetical, as well as exorbitant. I do not wonder that the respondents, acting as prudent uninsured owners, did not entertain it. A goods owner placed in this position is only bound to act reasonably, whether his action is regarded as taken under the "sue and labour" clause in the policy or judged in the light of the similar duty stated in sect. 78 (4) of the Act, which is expressly limited to such measures as may be reasonable for averting or minimising a loss. There are several cases in which similar questions have been discussed. I shall mention only two. One is *Lozano* v. *Janson* (22), where goods had been captured and condemned at St. Helena. Some portion, being perishable, was sold. The remainder, on an appeal to the Privy Council, was eventually released after two years. The assured had given notice of abandonment, and claimed in the action for a total loss. LORD CAMPBELL, C.J., said that the court, drawing an inference of fact from the evidence, thought that a prudent man, in the circumstances in which the assured found himself when he commenced the action, would not have taken possession of the goods at St. Helena, and that he was entitled to recover as for a total loss. Another instance of the same type may be found in *Stringer's* case (16), where the assured could have recovered possession of the goods and prevented the sale, but only on terms which a prudent uninsured owner would not have adopted, and hence, it was held, a total loss was recoverable. I do not think that the correspondence at Vigo prejudicially affects the position in regard to the respondent's claim. What is reasonable for the assured to do depends on the facts of the particular case. In the present case, I think that the conduct of the assured was reasonable. If, then, there was, as I am of opinion that there was, a constructive total loss, at least when the ship left Vigo, I certainly do not think that the loss was in any way adeemed by the arrival of the Wangoni with the goods on board at Hamburg, or by what happened there. Early in Mar., 1940, after her arrival, propositions for redelivering the goods—that is, the physical articles—there to the assured were made through a Dutch house, but, before anything could be done, Holland was invaded by the Germans, and no more was heard about it. What I have said as to the Vigo correspondence applies with even greater force when the goods were in an enemy port. I think, indeed, that the deprivation of the goods by enemies was then total, and, if it were necessary to consider it, might properly be held to be an actual total loss within sect. 57 of the Act, because the assured were irretrievably deprived of the goods.

The writ in this case was not issued until June 22, 1940, but the underwriters have disclaimed any reliance to the prejudice of the assured on delay, because the date of the writ resulted from negotiations and arrangements as to suitable test cases. The underwriters had in this case, as in the other cases, waived any question as to notice of abandonment, and accordingly the notice may be notionally taken to have been made at whatever date is most advantageous to the respondents, for instance, at the date of sailing from Vigo or of arrival at Hamburg. However, I think that at the date of the issue of the writ in this case, as in the other two cases, there was an actual total loss, if that had been relied on. In my judgment, this appeal should be dismissed.

The last of the three test cases deals with a parcel of jarrah boards shipped on the Halle, which was a German vessel, by or on behalf of the respondents, who were British subjects, from Bunbury, Australia, to London *via* the Cape of Good Hope. The goods were insured by the appellant and other British underwriters against war and marine risks. There was in this case also an agreed statement of facts, according to which the Halle sailed from Bunbury under a bill of lading dated July 27, 1939. She called at Durban on Aug. 16, 1939, and passed the Cape of Good Hope on Aug. 18, 1939. She is next heard of as having arrived at Bissao, Portuguese Guinea, on Sept. 6, 1939. She left there on Oct. 13, 1939. On Oct. 16, 1939, she was scuttled by those on board her, with her cargo, in the presence of a French warship. In other respects, the agreed statement of facts was substantially the same as that in the case of the Minden. HILBERY, J., did not feel able to infer that the master, in going to Bissao, was acting upon the orders of the German government, but he did infer that, in leaving Bissao, the master was sailing for Germany, and he was, I infer, prepared to hold that there was then a constructive total loss. For reasons similar to those on which he acted in the Minden case, he held in this case also that the loss was not recoverable, because it was barred by the frustration clause. The Court of Appeal reversed his decision. I agree with them. I do not see any substantial difference between this case and that of the Minden, except that it is not certain that the master, when he put into Bissao, which I regard as a port of refuge, was acting under orders of the German government. In any event, however, the deviation is, as HILBERY, J., points out, excused by the liberties given by the bill of lading, so that the deviation was excused under sect. 49 (1) (*a*) of the Act, even if the master's act in putting into Bissao was voluntary, and, therefore, sect. 45 (1) of the Act did not apply. However, having regard to modern facilities, such as wireless communications, I should be prepared to infer that the master put into Bissao because he had learned that war had broken out and felt that it was unsafe for the ship to proceed, so that, on this footing, sect. 49 (1) (*d*) applied. The policy in the Halle case is not precisely the same in its terms as that in the Minden, but I agree with MACKINNON, L.J., that no part of it raises different considerations. As in the other cases, notice of abandonment has been waived by the underwriters. The writ was issued on June 14, 1940, but nothing adverse to the claim turns on that. Indeed, at that date the loss was an actual total loss by scuttling, which could be recovered as such as a loss by enemies, if there was not a recovery for a constructive total loss. I agree with the Court of Appeal, for substantially the same reasons as in the case of the Minden, that the appellant fails.

Lord Porter: My Lords, these three appeals were heard together before your Lordships, as they were heard before Hilbery, J., and the Court of Appeal. They raise not dissimilar legal questions and involve the consideration of not dissimilar facts, but there are certain differences of fact in each case, and your Lordships were told that these three particular cases were chosen because of those differences. It was stated that underwriters had agreed with the assured to bring them before the court in order that as much guidance as possible might be obtained upon the obligations which are incurred under the terms of a policy of insurance covering war and marine risks which contains what is known as the frustration clause. That clause is as follows:

> Warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power.

It has now attained a common form and is identical in each of the policies sued upon. Its history is well-known. In *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday (Samuel) & Co.* (1), it was decided by your Lordships' House that, where goods were insured under a voyage policy, the frustration of the adventure by a peril insured against entitled the owner to recover as for a constructive total loss, even though the goods remained uninjured in the hands of the carrier and at the owner's disposal. The so-called frustration clause was inserted in order to prevent this result, since underwriters were unwilling to cover such a loss. However, although this was the origin of the clause, it does not follow either that underwriters did not desire to reduce their liability more drastically or that, even if they had no such wish, they have not in fact brought about a greater change than they contemplated.

In each of the three actions under consideration, the insurance was upon cargo carried in a German ship, and that cargo was insured against both war and marine risks. The actual terms of the cover differed a little in form in the individual cases, but no point turns upon this divergence, nor did either party ultimately rely upon it, though at one time the assured in the case of the Wangoni laid stress upon the fact that they were covered against all risks.

The material perils insured against are sufficiently described in the body of the policy in words which are contained in the standard form attached to the Marine Insurance Act, 1906:

> . . . takings at sea, arrests, restraints and detainments of all kings, princes, and people . . .

The facts in each case were agreed between the parties. No evidence was called, and underwriters who were desirous of having a decision upon the somewhat difficult questions involved agreed to pay the expense incurred by both sides in the course of the litigation.

Apart from those already stated, the facts common to all three cases were these. (1) Both appellants and respondents are British subjects. The ships were German ships. (2) On and after Sept. 3, 1939, there was risk of capture whenever the ship was outside the territorial waters of any neutral state. (3) As from Sept. 3, 1939, there was an effective blockade of all German ports by the British and French naval forces, who were further taking all possible steps to intercept and capture or destroy all German merchant vessels on the high seas. (4) At all material times, the German government, in furtherance of German war policy, had taken control of all German-owned merchant shipping, and had given orders to all such vessels and their masters to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels. The facts peculiar to each of the cases may be tabulated as follows.

1. Minden.

(*a*) The respondents' goods were to be transported from Buenos Aires for Hong Kong-Shanghai option (including transhipment at Durban). (*b*) The Minden sailed from Buenos Aires with Durban as her first port of call with the insured goods on board shipped under a bill of lading dated Aug. 16, 1939. On her normal voyage, she would have reached Durban about Sept. 5. (*c*) In fact, she put into Santos in Brazil on Aug. 24, and left on the same day. On Aug. 25 she arrived at Rio, and, having sailed thence on Sept. 6, was scuttled on Sept. 29 by those on board off the Faroe Islands, in the presence of a British warship, and was lost with all her cargo.

2. Wangoni.

(*a*) The respondents' goods were to be transported from Bremen in Germany to Capetown. (*b*) The Wangoni sailed from Bremen, with Capetown as her first port of call, with the insured goods on board, shipped under a bill of lading dated Aug. 12, 1939. On her usual voyage, she would have reached Capetown about Sept. 12. (*c*) In fact, she put into Las Palmas on Aug. 29, 1939, sailing thence that day for Vigo, which she reached on Sept. 1, and at which she remained until Feb. 10, 1940. On that day she again put to sea, having cleared for Hamburg, which she was successful in reaching on Mar. 5, 1940.

In the case of this ship, two tentative suggestions were made for restoring the goods to the British owners. The first was contained in a letter written by Messrs. Voight on Oct. 4, 1939, and forwarded by Messrs. Müller on Oct. 9 to the respondents. In this letter it was stated that it was intended to place the goods at the disposal of the shippers " as far as it will be possible to deliver them " under certain conditions—namely, (i) payment of full freight (so far as not yet paid) and discharging expenses, (ii) against surrender of the full set of original bills of lading duly indorsed and receipted, and (iii) additional payment of 25 per cent. of the value of the goods for calling at a port of distress according to para. 635 of the German commercial code, and an irrevocable banker's guarantee for 100 per cent. of the value of the goods. The German commercial code did not justify the claim to any such percentage for calling at a port of distress. The letter contained the two further stipulations that

(i) delivery could only be made so far as discharge and delivery should be possible with regard to the stowage and eventual other difficulties, and (ii) all charges for restowage were to be for account of the goods for which restowing is necessary, and asked for information whether the shippers wished to receive the goods at Vigo. The letter was shown to the underwriters, who indorsed it: " Act as if uninsured," and, when the assured requested the brokers to " act in the usual way," the latter replied that the war insurance was finished, as, under the frustration clause, the vessel put into a port of distress.

No further communication passed between the parties or the representatives of the German owners whilst the vessel was at Vigo, but on Feb. 14, 1940, as soon as it was ascertained that she had cleared and sailed from Vigo for Hamburg, the respondents put forward a claim for a total loss, and on Mar. 6 informed the brokers that the ship had reached Hamburg. Further negotiations took place whilst the ship was at that port.

On Mar. 27, the London Chamber of Commerce wrote to the respondents stating that the cargo had not been seized by the German government up to Mar. 21 and apparently the German government did not intend to seize it in the near future. The letter continued by saying that it was understood that the goods would be released in accordance with the conditions of the bills of lading and the stipulations of the German government subject to (i) payment of full freight (if not paid in advance), (ii) presentation of the full set of original bills of lading duly indorsed, and (iii) payment of a contribution to the expenses of the port of refuge of 13 per cent. c.i.f. value. Quay dues and warehouse rents accruing after discharge were to be for the account of the goods. The chamber pointed out that permission must be obtained from the Trading with the Enemy Branch of the Board of Trade before endeavouring to secure release of the cargo through a neutral intermediary, and in a later letter suggested Messrs. Müller of Rotterdam as a suitable intermediary.

By Apr. 27, permission to endeavour to obtain the release of the goods through Messrs. Müller on the terms stated was granted, and the respondents inquired of the Trade Commissioner for South Africa if the goods could be admitted into their original destination. The respondents were referred to Pretoria, and there the matter rested when on May 10 the German forces invaded Holland.

3. The Halle.

(*a*) The respondents' goods were to be transported from Bunbury in Australia to London *via* the Cape of Good Hope. (*b*) She sailed from Bunbury with the insured goods on board shipped under bills of lading dated July 27, 1939, called at Durban on Aug. 16, and passed the Cape of Good Hope on Aug. 18. On a normal voyage, she would have arrived in London about Sept. 16. (*c*) In fact, she arrived at Bissao in Portuguese Guinea on Sept. 6, sailed thence on Oct. 13, and on Oct. 16 was scuttled by those on board in the presence of a French warship and was lost with all her cargo.

In all three cases the policies contained the usual clause holding the assured covered in case of deviation or change of voyage. In each case it was agreed that the court might draw inferences of fact. The facts in the first and last cases are almost identical. It is true that in the case of the Minden a very wide deviation clause is to be found in the bill of lading, and that " all liberties as per contract of affreightment," are included in the policy, whereas in the case of the Halle, though the bill of lading contains a war clause giving " the carrier the rights and liberties as set out in the war risk clause incorporated " with it, I cannot find in the charterparty which it incorporates or in the bill of lading itself any such liberties. I will refer to the clause appertaining to the Minden later on, but, in the view which I take, that difference is immaterial, as is the fact that, whereas in the one case the ship reached her port of refuge, whether Santos or Rio be so regarded, before the outbreak of war, in the other, Bissao was not entered until after hostilities had begun. The case of the Wangoni gives rise to some further considerations, since she succeeded in running the blockade and reaching her home port, though only after a voyage of 25 days.

The statements of fact are not entirely explicit, but perhaps no greater accuracy could be obtained. I interpret them as meaning that at some unspecified period before the outbreak of war the German government had issued orders which, as good citizens, the masters were bound to obey. Those orders were that, if war became imminent, refuge was to be taken in a neutral port, and at the master's discretion, either before or after hostilities began, the ships were to return to Germany, or to be scuttled if they could avoid capture in no other way. I infer that in each case the masters carried out these instructions to the best of their ability. In pursuance of them, the Minden put in first at Santos and then at Rio, creeping as near as she could to Germany, so as to be ready for the final dash if war came. The Wangoni turned back to Las Palmas, and later to Vigo, for the same purpose, and the Halle, whose voyage in the normal course brought her nearer to Europe, put into Bissao as a port of refuge, and put out again in an endeavour to reach a German port.

In the cases of the Minden and the Halle, the masters at some period not later, in the one instance, than the moment of sailing from Rio, and, in the other, from Bissao, in pursuance of the orders of the German government abandoned their contractual voyages and endeavoured to take their ships and cargo to a German port, running what risk there might be of having to scuttle their vessels to avoid capture. Similarly, in the case of the Wangoni, the master, after putting into two ports of refuge, sailed for Germany as a result of his government's commands.

It was admitted that in each case, had it not been for the frustration clause, there would have been a constructive total loss by loss of the adventure, but it was said on behalf of the appellants that there was no constructive total loss of the goods themselves, because the voyage insured had come to an end before loss, and because at any time at which the cover still subsisted the actual total loss of the subject-matter insured neither appeared to be unavoidable nor could it not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred, and in particular it was said that it was not unlikely that the assured could recover his goods or that the cost of A recovery would exceed their value when recovered. The conditions of the Marine Insurance Act, 1906, s. 60, necessary to constitute a constructive total loss had, therefore, not been fulfilled. The argument, as I understood it, was as follows. At some time before the outbreak of war, it matters not when, the several masters had received the orders of the B German government. They had thereupon either abandoned—or, at any rate, deviated from or changed—the insured voyage. Thereupon, the cargo carried in them ceased to be covered by insurance, because the goods were not protected except at a time when they were being carried on the voyage insured. It is true that by that abandonment, C deviation or change of voyage, undertaken at the command of the German government, there was a loss of the adventure, but there was no loss of the goods, or, if there was a loss of the goods, the same loss constituted a loss of the adventure, and, therefore, the assured could not recover, owing to the operation of the frustration clause in the policies. D

I stress that aspect of the argument which asserts that the goods are protected only whilst on the insured voyage in order to show that it was not argued before your Lordships' House that only the adventure is insured, and not the goods apart from the adventure. It is true that a loss which occurs after the insured voyage (whatever it may be) is terminated is irrecoverable, but it is, I think, obviously wrong to assert that E any loss of the goods which also frustrates the adventure is excepted from the cover given. Certainly any total loss of the goods insured, whether actual or constructive, must put an end to the adventure. They are lost and cannot be carried further. However, a construction of the frustration F clause which deprives the assured of any indemnity in case of a total loss by restraint of princes is not, in my view, necessitated by the wording of the clause. The goods may be lost, or, alternatively, the adventure may be lost without the assured being deprived of the goods themselves, and, apart from the frustration clause, the assured can recover in either case. G The cover is twofold. If authority be required for such a proposition, it is necessary only to refer to some of the cases cited by the judge of first instance and to repeat the wording which he quoted. In *Sanday's* case (1) in the Court of Appeal, Lord Reading, L.C.J., said, at p. 811:

> But it is not only the goods that are the subject-matter of the insurance . . . H

and Bray, J., said, at p. 832,

> It is not true that in a policy of this kind the goods only are insured.

In the same case in your Lordships' House, Earl Loreburn expresses a similar view when he states, at pp. 657, 658:

> The words of this policy have for generations been understood and held by judges to designate not merely the goods, but also the adventure.

I have dealt with this point, though it was not argued before your Lordships, because, in the view of the Court of Appeal, the judge decided against the respondents on the ground that any war peril which frustrated the adventure, and, therefore, every total loss so caused, was excepted from the cover given by reason of the terms of the frustration clause. The judge in the course of his judgment says ([1940] 4 All E.R., at p. 103) :

> The policy being a marine insurance policy, the subject-matter of the insurance is of the adventure of the goods on the voyage. The goods are not insured apart from the voyage. It is the voyaging with the goods or the goods upon the voyage which is the subject-matter of the contract.

The expression is not very clear, and, in criticising it, MacKinnon, L.J., points out that the subject-matter of the contract is the goods, and they are insured against loss or damage by insured perils, but, even if the goods are not so lost or damaged, there is an additional insurance against the loss of their voyage. He adds ([1940] 4 All E.R., at p. 405) :

> The judge considers this to be not an additional risk, but an essential part of it in every case . . .

I would accept the language of MacKinnon, L.J., subject to the qualification—which, indeed, he clearly recognised—that the goods are covered only while on the insured voyage, just as chattels ashore insured in a particular place are covered only whilst in that place. The judge may have meant only to emphasise this fact, though I feel some difficulty in so interpreting him when he says a little later on in the course of his judgment ([1940] 4 All E.R., at p. 104) :

> The same restraint, therefore, which the plaintiffs say caused a loss of the goods caused a loss of the goods through a loss of the adventure, and, in those circumstances, the plaintiffs do not show a loss through a peril insured without establishing that the loss was also due to a peril excepted by this " warranted free " clause . . .

Whatever the meaning of those observations may be, it is, I think, plain that there may be a loss, total or partial, actual or constructive, of the goods by war risk which is not within the exception. The goods are lost, and it is unnecessary for the assured to rely upon the loss of the adventure. Underwriters do not succeed in proving a loss within the exception merely by showing that the adventure has been lost. A total loss of goods must always have that result. They must go further and show that the claim of the assured follows, and is based upon, the loss of the adventure, and not merely that the loss of the adventure is a consequence of the loss of the goods, even though that loss be due to combatant seizure.

A more forcible argument, however, remains to be considered. Is it true to say that the insurance had come to an end before the loss claimed in each case occurred ? It is said on behalf of the appellants that, when the individual master concerned left the course of his voyage by putting into a port of refuge or turning back towards Germany, he thereby abandoned the insured voyage, or deviated from or changed it, and that, in whichever of these ways his act be regarded, the goods ceased to be carried on the insured voyage and the cover lapsed, or, at any rate, the underwriters were entitled to a substantial additional premium under the "held covered" clause. In dealing with this argument, it is desirable to treat each case separately.

In the policy upon the cargo carried in the Minden, cl. (12) of the clauses for shipments from South America contains the words: "Including all liberties as per contract of affreightment." That contract is to be found in the bill of lading, to which is attached a war clause giving the widest possible liberty to the carrier in the event of the imminence or existence of war, including the liberty to comply with any orders or directions as to routes, ports of call, stoppages or destinations or otherwise, however given, by any government, and anything so done is not to be deemed a deviation. Under this liberty, I should regard the alteration of route to Santos and Rio as constituting part of the contractual voyage, and as not being a deviation. In truth, however, it is not necessary for the assured to rely upon this clause, inasmuch as that deviation is excused under the Marine Insurance Act, 1906, s. 69, as being caused by circumstances beyond the control of the master and his employer. The section follows the rule in force from early times, as is perhaps best exemplified by the quotation from Roccus, Vol. 52, 53, cited in E. Emerigon, c. xiii, sect. 15, p. 94, which is quoted in Arnould on Marine Insurance, sect. 425:

> *Si iter mutaverit magister ex aliqua justa et necessaria causa, puta ex causa refectionis navis vel ad evitandam maris tempestatem, vel ne incideret in hostibus in istis casibus, mutato itinere, tenetur assecurator.*

The master's act was both necessitated by moral force and reasonably necessary for the safety of the ship, which, unless such steps were taken, might well have fallen into the hands of the British Navy. It is said, however, that, in addition to, or instead of, deviating, the master at some stage changed his voyage. I do not think that he did in the sense in which those words are used in the Marine Insurance Act, 1906. Change of voyage is now defined in sect. 45 of the Act as occurring when, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy. There was no voluntary change in the case of the Minden. The master was acting, not on his own initiative, but on the orders which, to use the words of Lord Ellenborough in *Phelps* v. *Auldjo* (6), morally as a good subject he ought not to have resisted. The same considerations apply to the Halle. As I have said, I cannot find any authorisation for deviating or changing the voyage in the contract of affreightment, but, as the master's action was caused by circumstances beyond his and his employer's control, and was involuntary, the deviation was excusable, and the voyage was not changed within the provisions of sect. 45 of the Act. Nor do I see any difference in this respect in the case of the Wangoni. The full terms of the bill of lading are not in evidence, and I can find no liberty to deviate or change the voyage, but the master's action was brought about by orders identical with those on which the other two masters acted. These considerations establish, in my view, that in none of the shipments was there either deviation or change of voyage on which the appellants could rely as discharging them from liability.

In each instance, as I have indicated, the policies contained the "held covered" clause, the wording of which, so far as is material, runs as follows:

> Held covered at a premium to be arranged in case of deviation or change of voyage.

The appellants contended that, even if they failed in their main contention, they were entitled to at least a very substantial additional premium under the terms of this clause. As, in my view, the deviation is excusable, and there has been no change of voyage, no extra premium is payable.

There remains to be considered whether there was at any time a loss, for which the assured can recover, by a peril insured against. At some time, each of the masters abandoned the insured voyage and set his vessel's course for Germany or the bottom of the sea, as might transpire. At that moment, the insured voyage came to an end, but it does not follow that at that moment the underwriters ceased to have any further liability for the goods which they had covered. In the first place, was there a loss to the assured of his goods by restraint of princes ? So far as the Minden and the Halle are concerned, both the judge of first instance and the Court of Appeal held that there was, and I agree with them. Nor do I think that it matters at what precise moment of time the abandonment of the voyage is placed. Whether it be when the master first decided to put into a port of refuge and thence make the attempt to reach Germany, or when he reached the first or second port of refuge, or when he set sail from that port, appears to me to be immaterial. At some time he set out for a German port with the goods on board in pursuance of his government's orders, and at that moment the owner was deprived of his goods at a time when no change of voyage had taken place, and there had been only an excusable deviation.

It is unnecessary to repeat the views expressed in *Robertson* v. *Petros N. Nomikos, Ltd.* (7), at pp. 382, 391, with the reasoning of which all your Lordships who were present at the hearing agreed. In accordance with that reasoning, if the assured has been deprived of his goods and it is unlikely that he can recover them, there is a constructive total loss. Was it unlikely in these two cases ? The judge and the Court of Appeal thought that it was. To judge by the after-event, the inference was justified. However, one must judge, not by the result, but from the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice of abandonment, had notice been required. I say "had notice been required" because, though want of notice was pleaded, the point was given up. Indeed, it could not successfully have been taken, since the first the assured heard of their loss was when they heard of the scuttling of the ships concerned. If that be the moment at which the likelihood or unlikelihood of recovery would have to be determined, the respondents succeed in their claim obviously, because the loss they sustained had then become actual and total. This of itself might constitute a ground upon which the assured could recover in these two cases. From the time the master broke off from his contractual voyage in order to return to Germany, whether that be when he made up his mind to abandon the voyage (as ARNOULD seemed to think from his observations in ARNOULD ON MARINE INSURANCE, sect. 380), or whether it be when that purpose was manifested, to use the word found in the Marine Insurance Act, 1906, s. 45 (2), or whether the true inference is that the moment to be chosen is when the ships left their last port of refuge, the owners were deprived of their goods, which thenceforward remained in the control of the German government, and in the grip of their restraint, until they were lost by the master's action in scuttling his ship. For this purpose, it is immaterial that they had previously been seized. That seizure would or would not amount to a constructive total loss according to whether the assured was or was not likely to recover them and what expense he would incur in doing so, but that loss, whether partial only or constructive and total, was, by the scuttling, converted into an actual total loss, whilst the goods were still covered by the policy.

If it was desired to rely upon the original seizure as constituting a constructive total loss of the goods, notice of abandonment of the goods, had notice been insisted on, would have been necessary, but, whether or not he had, or is to be regarded as having, given notice of abandonment, the assured could, if actual total loss followed that which was partial or constructive only, neglect the latter and recover for the former. The principle is well-known, and one illustration may suffice. In *Mellish* v. *Andrews* (8), goods carried in a ship detained by the Swedish government might have been the subject of a claim for a constructive total loss if notice of abandonment had been given in time, but notice was held to be too late, and the defendant underwriters obtained a verdict on that account. The goods, however, had afterwards been unloaded and seized by the same government, and, on appeal, a new trial was ordered, on the ground that the subsequent seizure constituted an absolute total loss for which the assured was entitled to recover. However, this aspect of the case has not been developed. Let me therefore assume that the question is whether the owner was unlikely to recover them once the German government's orders were acted upon. At that moment, I think that it was much more likely that they would be lost than that they would survive, and I regard the escape of the Wangoni as exceedingly fortunate. In my judgment, they were more likely to go to the bottom of the sea than to reach Germany, and, even if they reached Germany, the assured was unlikely to recover them. If this be the true inference, then, once the master sailed for a German port, the goods were a constructive total loss at a moment when they were still being carried in the ship mentioned and on the voyage insured in the policy. It is true that the adventure was put an end to by that loss, but the adventure was only lost through the loss of the goods. The goods were not lost by reason of the loss of the adventure.

On these grounds, I should hold that the frustration clause had no application to the circumstances of these cases. It was meant to deal, and I think its wording appropriately deals, with a case where the assured, if he is to recover at all, must rely upon the loss of the adventure, and cannot rely upon the loss of the goods. For my own part, I should take this view even if the wording of the clause had been "frustration of the adventure by restraint of princes always excepted." My view is strengthened, however, when I find that the phrase used is "warranted free of any claim based upon loss of the adventure." No doubt it can be said that "based upon" bears the same meaning as "founded upon," but, whichever word is used, it is the claim which must be based or founded upon frustration in order to exonerate the underwriters, and "claim," to my mind, in that collocation, suggests the form of claim adopted by the plaintiff, and not a possible claim which he might have made had he so desired.

I cannot distinguish the case of the Wangoni in essence from that of the other two ships, save in one respect. I am willing to assume it to be a possible inference that the master did not abandon the voyage or intend to hold the goods for the German government at any rate until he left Vigo in February, though I should myself draw the inference that he had already determined to slip away to Germany with the goods on board as soon as an opportunity offered, and that his suggestion of discharge at Vigo was made only to produce the impression that he intended to stay there, or in case his attempt to escape proved unsuccessful. Assuming, however, that his suggestion was genuinely made, what was it worth ? In every respect it was tentative—"As far as it will be possible to deliver them," "We must, however, draw attention to the fact that delivery can only be made so far as discharge and delivery is possible with regard to the stowage and other difficulties," "All charges for restowing to be for account of the goods for which restowing is necessary." This wording, coupled with a suggestion of a heavy additional expenditure and an irrevocable bank guarantee, is not such as to induce the belief that the goods could ever have been recovered by their owners at Vigo, or, if they could, that the expense would not exceed their value.

Your Lordships were told that the parties were anxious that, in considering the probability of recovering the insured property from this ship at Vigo at an expense less than their value, the fact that there were other British goods of great value on board should be borne in mind. If this argument is to be considered at all (and I doubt if it is legitimate to do so), it would, I think, also be pertinent to know whether any of those other goods were recovered, or if they, like those belonging to the respondents, were carried on to Germany. In default of further information, I should myself regard them all as unlikely to be recovered, even up to the time when the vessel left Vigo. As to those not the subject-matter of the present action, however, I cannot judge of the expense involved. On this view, it is immaterial to consider what happened at Hamburg. The assured made a claim for a total loss as soon as they heard that the vessel had left for that port. Even if the later events are to be considered, however, I should be prepared to hold that up to the end it was unlikely that the assured would recover the goods. It would have taken time to effect their release and to arrange, if arrangement were possible, for their shipment to South Africa. Events in Europe were not such as to lead the assured to think that the possibility of negotiation on the terms permitted would continue after the invasion of Holland on May 10, and it is to be remembered that negotiation through Messrs Müller of Rotterdam alone was permitted. To begin all over again in the altered conditions was, I think, unlikely to result in the release of the goods, even if the British government would still permit negotiations to continue. I conclude, therefore, that the insured goods carried in all three ships were constructively lost at the moment when the masters determined to return to Germany and acted on that determination. It is not necessary to decide when that moment was. At the latest, it was when each ship left her last port of refuge, and at that time the goods were still covered by the respective policies. I agree in substance with the Court of Appeal, and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Slaughter & May* (for the respondents in the first appeal); *William A. Crump & Son* (for the respondents in the second and third appeals).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law*.]

Re FEVERSHAM'S CONTRACT.

[Chancery Division (Morton, J.), **July 30, 1941.**]

Trustees—Powers—Delegation of powers—Delegation to two jointly and each of them severally—Power of one to execute conveyance—Interpretation Act, 1889 (*c.* 49), *s.* 1 (1)—*Execution of Trusts (Emergency Provisions) Act,* 1939 (*c.* 114).

By the Execution of Trusts (Emergency Provisions) Act, 1939, s. 1 (1), a trustee or tenant for life may delegate his powers "to any person, or to two or more persons jointly," whilst he is engaged on war service. The tenant for life of certain estates, prior to going overseas on war service, delegated his powers to two attorneys "jointly and each of them severally." The conveyance of a large part of the settled estate was executed by one attorney only. The purchaser contended that both attorneys should execute the conveyance, on the ground that the words of the Act "or to two or more persons jointly" meant that, if two persons were appointed, they could not act severally:—

Held: upon the proper construction of the Act, one attorney had power to act severally, and the execution of the conveyance by one attorney was sufficient.

[**EDITORIAL NOTE.** This matter is decided purely on the construction of the Act. By the Interpretation Act, 1889, the singular includes the plural unless a contrary intention is shown, and, therefore, the words " to any person " include a delegation to a number of persons. It is further held that the words " or to two or more persons jointly," which immediately follow the words " to any person," do not prevent a delegation to several persons individually, so that each has full power to act for the appointor. There is, of course, a well-known rule that, in private trusts, all the trustees must concur in a conveyance, but that rule would not prevent a trustee from delegating his powers to two or more persons severally, since each would fully represent the trustee and his act would in all respects be the act of the trustee.

As to Delegation of Trustee's Powers, see HALSBURY, Hailsham Edn., Vol. 33, pp. 221, 222, para. 403 ; and for Cases, see DIGEST, Supp., Agency, No. 296a.]

Vendor and Purchaser Summons asking for a declaration that a conveyance should be executed by both the attorneys appointed by a tenant for life. The facts are fully set out in the judgment.

A. C. Nesbitt for the applicant.

Lindsay M. Jopling for the respondent.

Morton, J. : The Earl of Feversham is tenant for life under a settlement of certain lands in Yorkshire known as the Duncombe Park Estates, and, in respect of those lands, a vesting deed has been executed, dated May 5, 1928. He is also tenant for life under a settlement of certain other lands in Yorkshire known as the Westerdale Estate, and, in respect of those lands, a vesting deed has been executed, dated Jan. 3, 1933. He is an officer in His Majesty's Army, and at the present time is serving overseas. Before he went overseas, he was desirous of delegating the trusts, powers and discretions vested in him as tenant for life under the settlements of these two estates during the period when he would be on war service and for one month thereafter. The Act enabling him to do that is the Execution of Trusts (Emergency Provisions) Act, 1939. Sect. 1 (1) of that Act provides as follows :

> Notwithstanding anything in any enactment or any rule of law or equity, a trustee, personal representative, tenant for life or statutory owner may, subject to the provisions of subsect. (3) of this section, delegate to any person, or to two or more persons jointly, the exercise, during the whole or any part of (*a*) any period during which he is engaged in war service ; and (*b*) a period of one month thereafter ; of any functions vested in him as such.

On Jan. 3, 1940, the Earl of Feversham executed a power of attorney. After reciting the fact that the Earl was tenant for life under the settlements of the Duncombe Park Estates and the Westerdale Estate, that document continues as follows :

> The principal [the Earl of Feversham] is an officer in His Majesty's Army and is now upon war service as defined in the Execution of Trusts (Emergency Provisions) Act 1939 . . . and is desirous of appointing his wife Anne Dorothy Countess of Feversham and Thomas Hutchinson of Sarsden Glebe Churchill in the county of Oxford a captain in His Majesty's Army . . . jointly and each of them severally to be his attorneys and attorney in manner hereinafter appearing Now This Deed Witnesseth as follows : In exercise of the power in that behalf contained in the Act the principal hereby delegates to the attorneys jointly and each of them severally the execution of the trusts powers and discretions vested in him as tenant for life

> under the said settlements during such periods as the principal is on war service as defined in the Act and one month thereafter.

There is nothing else in that document which is material for the present purpose.

A contract has been entered into for the sale by the Earl of Feversham as tenant for life of a large portion of the settled lands referred to. No question arises on the contract or on the title to the property, but the purchaser has made a requisition requiring that both of the attorneys must execute the conveyance. The vendor, on the other hand, contends that the conveyance, which has been executed by Captain Hutchinson, has been properly executed and that the requisition is ill-founded.

At first sight it would seem that the vendor's contention is right. Captain Hutchinson is a person, and he has been appointed by the Earl of Feversham to exercise powers which would include the execution of the conveyance of these lands. Therefore, *prima facie*, it would seem that the conveyance is in order. However, counsel for the purchaser draws attention to the words in sect. 1 (1) of the Act, "or to two or more persons jointly," and he submits that, as the tenant for life is in the position of a trustee as regards his statutory powers, and cannot delegate them unless he is authorised to do so by some statutory enactment, one must scrutinise strictly the terms of the statutory enactment to see whether he is given powers which he would not otherwise possess. He says that the Act is an enabling Act which should be read strictly, and he argues that, in view of the words "or to two or more persons jointly," I ought to read the Act as having the effect that two or more persons can jointly be appointed as attorneys for these purposes, but that two or more persons cannot be appointed severally for these purposes.

Looking simply at this Act and reading it, as I must, in conjunction with the Interpretation Act, 1889, I find that by sect. 1 (1) of the latter Act it is enacted, so far as is material to the present case :

> In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears . . . (*b*) words in the singular shall include the plural . . .

Therefore, unless I can find in the Execution of Trusts (Emergency Provisions) Act, 1939, s. 1, a contrary intention, I ought to read the words "any person" as including the plural. Notwithstanding the argument of counsel for the applicant, I have arrived at the conclusion that I cannot find any contrary intention in the section in question. I think that the natural meaning of the words "any person," supplemented by the provisions of the Interpretation Act, 1889, is that a tenant for life can select not only one person, but several persons, if he thinks fit to do so, for this purpose, and I do not think that I can give to the subsequent words "or to two or more persons jointly" the force which counsel for the applicant asks me to place upon them.

I have been referred to the Acts passed for a similar period during the Great War. The Execution of Trusts (War Facilities) Act, 1914, s. 1 (1), provides as follows :

> A trustee (whether a sole trustee or a trustee with others) may, notwithstanding any rule of law or equity to the contrary, by power of attorney, attested by one or more witnesses, delegate to any person capable of being appointed to be a trustee of the trust the execution during any period for which the trustee is engaged on war service within the meaning of this Act, and a further period of one month thereafter, of any trust of which he is trustee.

That provision was supplemented by the Execution of Trusts (War Facilities) Amendment Act, 1915. Sect. 1 of that Act provides as follows :

> A tenant for life or a person having the powers of a tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, shall be deemed to be a trustee within the meaning of the Execution of Trusts (War Facilities) Act, 1914, (hereinafter referred to as the principal Act), and accordingly may in pursuance of the principal Act by power of attorney delegate the exercise of all or any of his statutory powers under the Settled Land Acts, 1882 to 1890, and also all or any of the powers (if any) conferred upon him by the settlement in extension of such statutory powers : Provided that such delegation shall only be made to the trustees of the settlement for the purposes of the said Acts or to one or more of them.

I do not think that those Acts afford any real assistance in the consideration of the question now before me. It is clear, under the Acts to which I have just referred, that a trustee could delegate powers to one or more of a limited class of persons—namely, the trustees of a settlement—and it appears to me clear that, under sect. 1 of the Act of 1914, a trustee could so delegate his powers to more than one person. It seems to me that the words " or to two or more persons jointly " may be reasonably explained as words which are intended to remove any doubt which may exist as to whether the powers could be delegated to two or more persons jointly, and that they do not have any effect on the construction which I should otherwise have given to the immediately preceding words, " any person." There is this further observation to be made. The Act of 1939 is entitled :

> An Act to facilitate the execution of trusts during the period of the present emergency.

It would clearly be extremely inconvenient if a soldier, being one of the persons allowed by the Act to delegate his powers and contemplating a departure from Great Britain on active service, could select only one person to be his attorney, because he might go overseas and the person who was selected might die, and then a very difficult situation indeed would arise. I am glad that I do not feel constrained by anything which I can find in this section to give these words such a limited meaning as that contended for by counsel for the applicant. I think that the tenant for life under the section is free to select two or more persons severally as his attorneys. For these reasons, I hold that the purchaser's objection to the execution of the conveyance by Captain Hutchinson alone is not well-founded.

Summons dismissed. Costs agreed between the parties.

Solicitors : *Atkey & Son* (for the applicant) ; *Trower, Still & Keeling* (for the respondent).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

R. *v.* HOME SECRETARY, *Ex parte* GREENE.

[Court of Appeal (Scott, MacKinnon and Goddard, L.JJ.), **July 15, 30, 1941.**]

Emergency Legislation—Imprisonment under defence regulation—Person of hostile associations—Validity of order—Sufficiency of affidavit by Home Secretary stating bona fide belief—Defence (General) Regulations, reg. 18B—*R.S.C., Ord.* 59.

The applicant was arrested on May 24, 1940, under an order made by the Home Secretary on May 22, 1940, in pursuance of the Defence (General) Regulations, reg. 18B. The order stated that the applicant was a person of hostile associations and that, by reason thereof, it was necessary to exercise control over him. The applicant applied for an order for his release under R.S.C., Ord. 59. By clause 3 of the regulation the applicant is given the right to appeal to the advisory committee. It appeared that the notice by the chairman to the applicant stating the grounds for his detention was inaccurate in certain particulars :—

Held : (i) in such a case an affidavit by the Home Secretary stating his belief in the reason given for the applicant's detention in the order was sufficient and it was not necessary that it should state his grounds for such belief.

(ii) where the return, or the affidavit showing cause, exhibits an order of commitment regular on its face, an affidavit by the Home Secretary is unnecessary.

(iii) where an order regular on its face is produced, the onus is on the applicant to prove facts necessary to controvert it.

(iv) the object of cl. (8) of reg. 18B is to provide that, once the order is made, the person named therein can be kept in custody anywhere, and not only in a lawful prison.

(v) where the person having the custody of the prisoner makes an affidavit showing cause, the original order signed by the Home Secretary should be exhibited thereto.

(vi) it being found as a fact that the applicant was not prejudiced by the discrepancy, the mistake could not invalidate an originally good order.

[**EDITORIAL NOTE.** It has been stated before in these notes that the decision in *Ex p. Lees* (3) enunciated no new principle of law and that it was well-settled that the Home Secretary could not be asked to give the reasons for his opinion that the detention of the person detained under reg. 18B was necessary in the public interest. The persistency with which the opposite view has been argued is, perhaps, a little remarkable, but in the judgments herein we have a concise statement of the law and the reasons for it by Goddard, L.J., and an examination of the authorities by Scott, L.J., which remove any doubt which could have existed. Certainly some doubt must have been introduced into the matter by the dissenting judgment of Stable, J., in *Ex p. Budd* (9), but any difficulty caused by that judgment is now removed by the unanimous decision of the Court of Appeal. The legislation in question gives the detained person a safeguard against improper detention by allowing a reference of the matter to the advisory committee and by requiring the Minister to make to Parliament a monthly return as to the persons detained under the regulation. Apart from the general question of an appeal from the exercise of the discretion of the Home Secretary in such cases, the judgments deal with the question of procedure in *habeas corpus* cases as varied by R.S.C., Ord. 59, pointing out that in some cases it will be quite unnecessary for the Home Secretary to make an affidavit at all.

As to Detention under Emergency Regulations, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662 ; and for Cases, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to:

(1) *R.* v. *Halliday, Ex p. Zadig,* [1917] A.C. 260; 2 Digest 198, *560*; 86 L.J.K.B. 1119; 116 L.T. 417.

(2) *R.* v. *Leman Street Police Station Inspector, Ex p. Venicoff, R.* v. *Secretary of State for Home Affairs, Ex p. Venicoff,* [1920] 3 K.B. 72; Digest Supp.; 89 L.J.K.B. 1200; 23 L.T. 573.

(3) *R.* v. *Home Secretary, Ex p. Lees,* [1941] 1 K.B. 72; Digest Supp.; 110 L.J.K.B. 42; 164 L.T. 41.

(4) *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*), [1931] A.C. 662; Digest Supp.; 100 L.J.P.C. 152; 145 L.T. 297.

(5) *R.* v. *Brixton Prison* (*Governor*), *Ex p. Sarno,* [1916] 2 K.B. 742; 2 Digest 196, *551*; 86 L.J.K.B. 62; 115 L.T. 608.

(6) *R.* v. *Home Secretary, Ex p. Budd* (1941), Unreported, Mar. 27.

(7) *Liversidge* v. *Anderson and Morrison,* [1941] 2 All E.R. 612; Digest Supp.

(8) *Stuart* v. *Anderson and Morrison,* [1941] 2 All E.R. 665; Digest Supp.

(9) *R.* v. *Home Secretary, Ex p. Budd,* [1941] 2 All E.R. 749; Digest Supp.

(10) *Duncan* v. *Cammell Laird & Co., Ltd.,* [1941] 1 All E.R. 437; Digest Supp.

(11) *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1; 36 Digest 289, *377*; 8 L.J.Q.B. 294.

(12) *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; 36 Digest 293, *438*; *sub nom. R.* v. *Evans,* 9 L.J.Q.B. 82.

(13) *Watson's Case* (1839), 9 Ad. & El. 731; 16 Digest 256, *585*; *sub nom. R.* v. *Wixon* 8 L.J.Q.B. 129.

(14) *Bushell's Case* (1670), Vaugh. 135; 16 Digest 262, *664*.

(15) *R.* v. *Chiswick Police Station Superintendent, Ex p. Sacksteder,* [1918] 1 K.B. 578; 2 Digest 196, *553*; 87 L.J.K.B. 608; 118 L.T. 160.

Appeal by the applicant from a decision of a Divisional Court (Humphreys, Singleton and Tucker, JJ.), dated May 2, 1941, refusing to order the release of the applicant, whom the Home Secretary had purported on May 24, 1940, to detain under the power conferred on him by the Defence (General) Regulations, reg. 18b. The facts are fully set out in the judgment of Scott, L.J.

J. W. Williamson for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondent.

Scott, L.J.: This is an appeal from a decision of a Divisional Court (Humphreys, Singleton and Tucker, JJ.), by which that court refused to order the release of a British subject whom the Home Secretary had purported on May 24, 1940, to detain under the power conferred on him by the Defence (General) Regulations, reg. 18b. The application was made to the Divisional Court in accordance with R.S.C., Ord. 59, which somewhat simplifies the old procedure for obtaining the prerogative writ of *habeas corpus ad subjiciendum*, but has left the law governing the rights of the subject and the jurisdiction and duties of the High Court unaffected. The question still is, as it always was, whether the subject is lawfully detained. If he is, the writ cannot issue. If he is not, it must issue. The right to release under R.S.C., Ord. 59, is governed by the same principle. It is unnecessary in the present appeal to consider that fundamental rule of law. It is well understood, and its principles are well summarised and noted in the part of the article on Crown Practice relating to *habeas corpus* in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 9. The main, and, I think, the real question in the appeal is whether Greene was lawfully detained. The case for the appellant was clearly and forcibly argued before us by his counsel, but the court was A unanimous in the opinion that the appeal must be dismissed. In order to prevent doubts arising in the public mind if we reserved our decision on a matter so generally and urgently important both to the liberty of the subject and to the discretion of the executive in the prosecution of the war, we announced the dismissal of the appeal forthwith, but took time B to put our reasons in writing.

The applicant was arrested on May 24, 1940, pursuant to an order for his detention made by the Home Secretary on May 22 in the following terms:

> DEFENCE (GENERAL) REGULATIONS, 1939. DETENTION ORDER
>
> WHEREAS I have reasonable cause to believe Ben Greene of The Hall Cottage, C Berkhamsted, to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him: NOW, therefore, I in pursuance of the power conferred on me by the Defence (General) Regulations, 1939, reg. 18B, make the following order:
>
> I direct that the above-mentioned BEN GREENE be detained.
>
> May 22, 1940. JOHN ANDERSON,
> One of His Majesty's Principal Secretaries of State. D

The applicant is still under detention. The facts of arrest and subsequent detention and the contents of the order directing it all appear from the applicant's own affidavit in support of his application, affirmed by him on Mar. 21, 1941.

I shall have to refer to other clauses of the regulation, but it will E suffice if I read only clauses (1) and (8) *in extenso*:

> (1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained . . .
> (8) Any person detained in pursuance of this regulation shall be deemed to be in lawful F custody and shall be detained in such place as may be authorised by the Secretary of State and in accordance with instructions issued by him.

It is under cl. (1) that the Home Secretary purported to make his order. The chief issue in the appeal turns on the question of the jurisdiction of the Home Secretary and that in the main depends on whether he had G "reasonable cause to believe" the applicant "to be of hostile associations," for it is contended both that the existence of such reasonable cause is a condition precedent to his jurisdiction and that the facts constituting the reasonable cause are for the court to find and appraise, and not for the Home Secretary. That contention must depend primarily H on the proper interpretation of the clause, which is a question of law. For reasons which I will state later, there can seldom be any extensive controversy of fact on it and, in the present case, I do not think that there is room for any.

The applicant has in his affidavit himself exhibited the order and admitted that he was detained under it. If the Home Secretary had jurisdiction to make the order, the applicant was lawfully detained, and, under the old procedure, the return of that order to the writ would have been at least *prima facie* justification for the arrest. Under R.S.C., Ord. 59, the same result must follow. The arguments on behalf of the applicant were (i) that reg. 18B (1), on its true construction, makes the existence of facts constituting " reasonable cause " a condition precedent to the jurisdiction, (ii) that the Home Secretary had not such reasonable cause, (iii) that the court has a duty to inquire into the facts and satisfy itself on that issue, (iv) that the onus of proof is on the Home Secretary, (v) that he has not proved his case, and (vi) that the provision in reg. 18B (8) that " Any person detained in pursuance of this regulation shall be deemed to be in lawful custody " means " in lawful pursuance," and that, if it does not mean that, it is *ultra vires*. There were certain other contentions advanced, but it is convenient to postpone them till after consideration of the main question.

The only point of difficulty—and it is of real difficulty—is to decide to what extent the regulation leaves the ground for the Home Secretary's decision to his discretion. For the purpose of construing the regulation I think it important to keep certain matters in mind. In the first place, Parliament by the Emergency Powers (Defence) Act, 1939, has delegated an extraordinarily wide degree of legislative power to His Majesty in Council. Sect. 1 contains, *inter alia*, the following provisions :

> (1) Subject to the provisions of this section, His Majesty may by order in council make such regulations (in this Act referred to as defence regulations) as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community . . . (3) Defence regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and byelaws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the regulations. (4) A defence regulation . . . shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act . . .

The King in Council is, under our constitution, an executive rather than a legislative authority, for it is in practice the Cabinet itself, represented by certain members in attendance upon the King, and it is to that authority, representing the executive government, that Parliament did, for the duration of the emergency, entrust an almost plenary discretion. When that authority in turn delegated to a particular member of itself—namely, a Secretary of State—power to make orders within the scope of the regulation, *e.g.*, for the various war purposes specified in reg. 18B, I should presume, in the absence of clear words to the contrary, a similar intention to trust to his discretion. The history of the legislation helps to throw light on it. In the last war, reg. 14B was the precursor of the present reg. 18B. It was made under the Defence of the Realm (Consolidation) Act, 1914, s. 1 (4). By that regulation, the Home Secretary was only to act " on the recommendation of a competent naval or military authority or of one of the advisory committee thereafter mentioned," but, on receipt of such a recommendation, if it appeared to him that, " for securing the public safety or the defence of the realm, it was expedient, in view of the hostile origin or associations of any person," to detain such person, he was given complete discretionary power by order to do so. One such order for detention was considered by the House of Lords in *R.* v. *Halliday, Ex p. Zadig* (1), and the general principles there enunciated appear to me equally applicable in considering the interpretation of the present reg. 18B, subject always to due weight being given to the words of its opening protasis : " If the Secretary of State has reasonable cause to believe . . . " I recognise that those opening words do grammatically constitute a condition of some kind to be fulfilled before the Secretary of State can exercise his powers, but everything depends on its true meaning in its context, and that problem of construction cannot be solved without due regard to the general purport of the regulation as a whole. To that aspect, what was said in *R.* v. *Halliday, Ex p. Zadig* (1) has great materiality. It had been argued there that reg. 14B, on its natural interpretation, interfered with the liberty of the subject in so unconstitutional a manner as to make it necessary to put a limiting construction upon its language. The House, by a majority of four to one (Lord Shaw of Dunfermline dissenting), held to the contrary. Lord Finlay, L.C., said, at pp. 268, 269 :

> It appears to me to be a sufficient answer to this argument that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.

Later, Lord Dunedin said, at p. 271 :

> That preventive measures in the shape of internment of persons likely to assist the enemy may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has in my judgment, in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body ; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard.

A little further on Lord Atkinson dealt, at p. 273, with the necessity of " preventive justice " in times of emergency, and called attention to the precautions contained in the regulation to prevent error or abuse. One was the system of strong advisory committees, which is again provided for in the present regulation by clauses (4) and (5). Lord Wrenbury, at p. 307, pointed out that the powers conferred upon His Majesty in Council were to pass not bye-laws, but important legislation, and that the regulations took effect as if they were contained in the statute. He dealt with the express argument that the regulation was *ultra vires* the statute, an argument which has been half-heartedly advanced in the present case in regard to the first half of cl. (8). Although it is not now pressed strongly upon us, so much which has been urged verges on that argument that I think it useful to quote the words of Lord Wrenbury, at p. 308 :

> The application before your Lordships is for a writ of *habeas corpus*, and the ground advanced is that reg. 14B is *ultra vires*. If that were established he would be discharged. The Habeas Corpus Act is in full force ; but this statute and the

> regulations made under it have provided machinery for achieving in a way other than that of suspending the Habeas Corpus Act the preventive detention of persons who are not alleged to have committed any offence, but whom it is desired to prevent from committing one. The regulation is, in my judgment, one within the authority given by the Act.

With that preface for the purpose of clearing the air round the problem
A of interpretation, I come to the crucial point. What is the meaning fairly attributable to the opening language of cl. (1)? Who is to decide the issue of reasonable cause, the Secretary of State or a court? If a court is to decide, how could the question itself be brought before the court? By *certiorari* to quash his order, or *mandamus* to hear and deter-
B mine according to law? Obviously neither. It cannot be by *habeas corpus*, because the High Court does not sit as a court of appeal in such proceedings. If it be said that these are technical reasons, I reply that the answer is equally plain on the broad grounds of national interest stated in *R.* v. *Halliday, Ex p. Zadig* (1), which we ought to presume guided the
C present delegated legislation of His Majesty in Council. The whole regulation deals with a topic which is necessarily of a highly confidential character. It invites a decision, at least as a preliminary to action, by an executive Minister of the Crown who occupies a position of the utmost confidence, who has at his disposal much secret information which ought
D not to be made public—above all during a war—who is under a duty to keep that information and its sources secret, and, finally, who cannot be compelled in any court to divulge what he considers ought not, in the national interest, to be divulged. All the King's courts recognise that inhibition and enforce it. The arguments which have been advanced
E in some of the cases rest expressly or impliedly on a contention that the Home Secretary, in making an order, is exercising a quasi-judicial function as if he had to hear both sides before coming to a decision on the preliminary issue. That contention is, in my view, wrong. His capacity is purely executive, as it is when deciding whether or not to deport an
F alien, as was pointed out by the EARL OF READING, L.C.J., in *R.* v. *Leman Street Police Station Inspector, Ex p. Venicoff* (2), and I adopt his words, at p. 80:

> . . . the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon
> G the facts before him it is desirable that he should make a deportation order. The responsibility is his.

Even if the issue could properly be brought before a court, it would be futile to ask the court to decide it unless the material evidence could also be brought before it, and of that the impossibility seems to me self-
H evident. For these reasons, I do not think that the crucial words "reasonable cause" can properly be construed as imposing an objective condition precedent of fact, on which a person detained would be entitled in any legal proceedings to challenge the grounds for the Secretary of State's honest belief, either by requiring disclosure of the confidential information which he had received in the course of his official duty or by tendering evidence that there was in fact no reasonable cause. If the

Secretary of State's information is confidential, its confidential character, in my opinion, necessitates logically the conclusion that the regulation makes him the final judge of the reasonableness of the cause upon which he takes action, or, in short, that the condition is subjective, and not objective.

I agree that this meaning would have been made more obvious if the words "in his opinion" had preceded the words "reasonable cause," but that difference of language is not, in my opinion, sufficient to refute the conclusion I have expressed. In addition, there are certain further reasons which support that conclusion. First, there is the comparison with reg. 14B of the 1914 regulations. The draftsman of the present regulation obviously had the earlier one in mind. It may well be that the omission of the old requirement of a recommendation by a competent naval or military authority or advisory committee influenced the legislative decision to provide some other assurance to the public in its place. If so, the words "reasonable cause" may very properly have been chosen in the sure belief, as LORD FINLAY, L.C., said in *Halliday's* case (1), that the Secretary of State would exercise his powers only after satisfying himself that he had such reasonable cause. Secondly, reg. 18B preserves all the protective system of advisory committees, but improves it materially as a protection for the detained person (clauses (3) and (5)). Thirdly, cl. (6) places on the Secretary of State a significant new duty—namely, both to make a general report every month to Parliament and to state "the number of cases, if any, in which he has declined to follow the advice of an advisory committee." Fourthly, cl. (4) grants to every detained person an express new right, for which he is to be given "the earliest practicable opportunity," to make a direct appeal to the Secretary of State. If His Majesty in Council intended to confer a plenary discretion on the Secretary of State, could he have manifested that intention more clearly ? It is essential to the interpretation of cl. (1) to keep in mind its setting in the regulation as a whole, and, if it is so construed, the four considerations I have mentioned suffice, to my mind, to clear up any ambiguity left by its opening words and to establish the construction I put on it.

There is another possible interpretation of cl. (1), which is slightly different, but leads to the same conclusion. I assume for this interpretation that in one sense the objective existence of a "reasonable cause" is intended by the regulation to be a condition precedent to the jurisdiction of the Secretary of State. Even so, when he receives confidential information of a kind which compels his mind to the belief in question, that information must, in my opinion, necessarily constitute for him a reasonable cause and that must mean that the decision is left to him. If so, the condition is then *ipso facto* satisfied, provided always that he forms an honest judgment. On the affidavits of the two Home Secretaries in the present case, it is beyond dispute that each in his own mind did so arrive at an honest belief. It follows that the condition was fulfilled and that the detention was truly in lawful pursuance of the regulation, and it is unnecessary to consider whether cl. (8) gives artificial legality to a detention which was not regular.

Counsel for the appellant relied on the passage in the judgment of the A court (HUMPHREYS, OLIVER and CROOM-JOHNSON, JJ.), delivered by HUMPHREYS, J., in *R.* v. *Home Secretary, Ex p. Lees* (3), at p. 78 :

> The next and only other point taken was that the order is invalid because the Home Secretary never had any reasonable cause to believe that the applicant was a person to whom the regulation applied. Now the court entertains no doubt that upon an application for a writ of *habeas corpus* the court has power to inquire B into the validity of the order of detention, and for that purpose to ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order.

With the first half of the last sentence I entirely agree, but, unless the subsequent approval of the whole judgment by the Court of Appeal compels us to treat it as binding authority, I feel difficulty in accepting C the second part in all its generality, because it may be read as inviting inquiry by the court into the evidence of reasonable cause. I cannot think that the Divisional Court intended such a pronouncement, for they accepted the qualification submitted by the Solicitor-General that no court can " have before it all the material upon which the belief of the D Home Secretary was based." The Solicitor-General no doubt had in mind the duty of a Minister of the Crown under our English constitution to keep to himself all confidential information. On it he cannot be cross-examined, and no court will ever think of asking him to divulge it. There is a further point about *R.* v. *Home Secretary, Ex p. Lees* (3). When the E Court of Appeal heard that appeal, the applicant had already been released, and the court heard the appeal only for the purpose of dealing with the question of costs. If the court intended to say anything different from what I have now said (which I hardly think), I confess to some little doubt as to the binding authority of a judicial pronouncement by the F Court of Appeal of its reasons for dismissing an appeal by a prisoner in *habeas corpus* proceedings when, at the time of the judgment, the prisoner had already been set free. At any rate, I feel sufficient doubt as to the intended scope of the passage to which I have referred not to feel precluded by it from the free expression of my own view.

G It was also contended for the applicant before us that what I am saying is contrary to what was said by LORD ATKIN in delivering the advice of the Privy Council in *Eshugbayi Eleko* v. *Nigeria Government(Administering Officer)* (4), in approval of what Low, J., had said in *R.* v. *Brixton Prison (Governor), Ex p. Sarno* (5). LORD ATKIN said, at p. 671 :

H

> The question whether the applicant was an alien or not did not arise. He admittedly was ; but their Lordships agree with the opinion of Low, J., that, had the matter been in dispute, the court would have had to decide it.

I cannot see that there was any issue before the Privy Council in that case which makes that passage or the decision itself relevant to the interpretation of reg. 18B so as to affect the jurisdiction of the Secretary of State under it. In *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*) (4), the relevant ordinance conferred on the governor jurisdiction to deport if, and only if, certain antecedent propositions were established or admitted as extrinsic facts. First, the person to be deported must have been a native chief. Secondly, he must have been deposed, and even then he could not be deported unless, thirdly, there was a native custom requiring him to leave the area where he had been chief. It was held that the ordinance in question made each fact a condition precedent to any exercise by the governor of the power to deport, and that each condition had to be established either by admission or proof before a court. On none of the three was the governor given by the ordinance any power of discretionary decision, nor did any question of confidential information arise. The decision of the Privy Council that each condition created a justiciable issue, to be solved before the governor's jurisdiction could arise, therefore does not touch the present case. Nor does the view expressed by Low, J., in *R.* v. *Brixton Prison* (*Governor*), *Ex p. Sarno* (5), for the power to deport an alien necessarily involves a condition precedent to its exercise that the person should in fact be an alien, and the issue "alien or not alien" cannot be within the jurisdiction of the Home Secretary to decide unless the statute has by clear words conferred it on him, which the Aliens Acts do not. In my respectful opinion, the Privy Council were not intending to say anything which bears on the questions we have to decide.

We were supplied by the parties with transcripts of judgments in certain recent cases. I will refer to them shortly, taking them in their order of date. The first, a *habeas corpus* case, *R.* v. *Home Secretary*, *Ex p. Budd* (6), was a decision of a Divisional Court consisting of HUMPHREYS, SINGLETON and TUCKER, JJ. In that case, the order was made under reg. 18B (1A) on the ground of membership of an organisation within the mischief aimed at by that clause. It purported to deal with a large number of persons and was kept in the Home Office, three short documents being drawn up for service on the prisoner and otherwise. These documents ought to have been copies of at least that part of the omnibus order which concerned Budd. In truth, they were not copies at all, and purported to record an essentially different order by the Home Secretary—namely, under cl. (1) on the ground of hostile associations, and not on the ground of membership of such an organisation as is dealt with by cl. (1A). The court released the applicant, chiefly, I think, on the ground of that difference, holding in effect that it was an essential requirement of the regulation that the prisoner should be informed truly of the ground of the order made by the Home Secretary. It is not necessary for the present appeal to consider the other reasons discussed in that case, but it must not be assumed that I agree with all that was said.

The next case, *Liversidge* v. *Anderson and Morrison* (7), was an action by a detained person for a declaration against Sir John Anderson, who as Home Secretary had ordered his detention, and Mr. Morrison, who, as the next Home Secretary, did not let him out. The defence relied on the order of detention. The plaintiff applied for particulars [p. 614]:

> . . . of para. 3 of the defence (*a*) of the grounds upon which the first defendant had reason to believe the plaintiff to be a person of hostile associations, and (*b*) of the grounds on which the first defendant had reasonable cause to believe that, by reason of such associations, it was necessary to exercise control over the plaintiff.

Both Master Moseley and Tucker, J., refused them, and so did the Court of Appeal, consisting of MacKinnon, Luxmoore and du Parcq, L.JJ. They held that the plaintiff was not entitled to such particulars unless the onus of proof was on the defendants, and they were clear that it was not. That decision is indirectly helpful in the present case, because, if it had been held that the onus had rested on the Home Secretary to establish the grounds of his belief in the plaintiff's hostile associations or in the necessity of exercising control over him, it would have been opposed to the views I have expressed in this judgment.

The next case, *Stuart* v. *Anderson and Morrison* (8), was an action for false imprisonment tried before Tucker, J., without a jury. The plaintiff put forward two contentions, but I need refer to the second only, which was that the order of detention was bad because the Home Secretary had no reasonable cause for his belief. A regular order of detention was produced which it was admitted for the plaintiff was signed by the Home Secretary, although the copy served on the plaintiff had been signed by the Permanent Secretary of the Home Office. The Attorney-General elected not to put the Home Secretary in the box, in the judge's opinion rightly, and I agree. Tucker, J., held that the production of an order of detention, regular on its face, shifts the onus on to the plaintiff (assuming that it ever rested on the defendant, which is not my view), and he made some forcible observations, at p. 675:

> I do not desire to say anything more about the facts of the case, and I should have desired not to mention them at all, because I think that it is very undesirable in cases of this kind, where the court can of necessity know only part of the facts, that it should go into the merits at all. I would not have done so had it not been necessary to deal with the submissions of counsel for the plaintiff. One of the difficulties of seeking to invoke the jurisdiction of this court in these cases is that, of necessity, the court knows only a fraction of the case. This arises from the attitude taken up by the Home Secretary in these cases, which the Court of Appeal has held is the proper attitude—namely, his refusal to put before the court the material upon which he came to his conclusion in the matters.

He gave judgment for the defendants. I find myself in agreement with the above passage, and, indeed, with most of what he said in a careful, though *extempore*, judgment.

The last case cited to us was *R.* v. *Home Secretary, Ex p. Budd* (9). Budd had been released from detention, but had been re-arrested. He again took *habeas corpus* proceedings, but the Divisional Court (Viscount Caldecote, L.C.J., and Macnaghten, J., Stable, J., dissenting) refused to discharge him. As that case may come before us on appeal, I think it better not to discuss it, beyond saying that Viscount Caldecote, L.C.J., relied on a passage from the judgment of MacKinnon, L.J., in

R. v. *Home Secretary, Ex p. Lees* (3), and that I disagree with the conclusion of STABLE, J.

An entirely separate point, and one of public importance, was made on the applicant's behalf, both before us and in the court below, in connection with an appeal by him to the advisory committee pursuant to A cl. (3) of the regulations. Clause (5) puts on the chairman of the committee a duty:

> . . . to inform the objector of the grounds on which the order had been made against him and to furnish him with such particulars as are, in the opinion of the chairman, sufficient to enable him to present his case.

B

Unfortunately, the notice from the chairman, handed to the appellant for the purpose of informing him of the grounds upon which the order had been made against him, omitted the belief of the applicant's "hostile associations" on which the order had in fact been founded, and substituted as grounds for the order a belief of the Secretary of State that the C appellant had been "recently concerned in acts prejudicial to the public safety, and the defence of the realm, and in the preparation and instigation of such acts." These latter statements follow the language of the latter part of cl. (1), but the first paragraph of the "particulars" given under cl. (5) related solely to the ground for detention covered by D cl. (1A)—namely, membership of an organisation under foreign influence, or controlled by persons having associations or sympathies with enemy governments. It is the case that paras. (3), (4) and (5) properly come under the general heading of "hostile associations," but the omission of any reference to hostile associations from the general statement at the E head of the notice, coupled with the misrepresentation contained in para. (1) of the particulars, was at least likely to confuse the appellant and handicap him in his appeal.

It was contended that this discrepancy between the notice from the chairman of the advisory committee and the order in fact made by the F Home Secretary made the detention illegal *ab initio*, or, alternatively, from the date of the notice. I do not think that it can have either effect. The appellant appeared before the committee, and it is not suggested that he there complained of the discrepancy. He possessed the document originally served on him, and knew that "hostile associa- G tions" was the grounds on which it was made, as was found as a fact by the Divisional Court. He also saw that most of the particulars, if not all, fell within that general allegation. As found below, he received the notice five days before he appeared before the committee, and HUMPHREYS, J., held, upon the affidavit evidence, and after hearing the H applicant in person, that he was not in fact prejudiced by the mistake. As a matter of law, I cannot see anything in the regulation which would justify the conclusion that such a mistake by the advisory committee either invalidates an originally good order or confers a right to release.

A much worse mistake alleged by the applicant was that he had not been informed of his right to make representations direct to the Secretary of State under the regulation. The evidence was dealt with in the judgment below in detail, and the court held that the allegation was unfounded. It is, therefore, unnecessary to consider what the effect of such a default would be if it were proved. None the less, I attach great importance, and I am sure the Home Secretary does also, to the most careful observance of every precaution provided by the regulation for the protection of any person detained under reg. 18B. The liberty of the subject is only one degree less important than the safety of the nation. Unfortunately, there have now been several preventive detention cases before the courts in which errors of procedure have been committed, and certainly in *R.* v. *Home Secretary, Ex p. Budd* (6) such a discrepancy occurred between the supposed "copy" of the Home Secretary's order served on the person detained and the original order as amounted to more than an error of procedure, and led the Divisional Court to release the applicant. The subject's right of *habeas corpus*, as it is called, has not, as some still wrongly suppose, been abolished. It remains untouched in this war. It remained untouched in the last war, as the House of Lords pointed out in *R.* v. *Halliday, Ex p. Zadig* (1), but the safety of the state in war calls for stringent preventive steps to avoid grave risks. Reg. 18B is essentially such a provision, and it ought to be generally understood that it is not punitive, but is purely preventive in its object. If a person is unlawfully detained, he is still entitled to his release by the King's Bench. Conversely, however, it is essential that the executive should have wide discretionary powers to forestall dangers, and in no one of the cases which have come before the courts, so far as I can see, has there been the faintest ground for imagining that the public cannot implicitly trust the King's Minister holding the office of Secretary of State for Home Affairs to do his very best honestly to carry out the onerous duties imposed on him by reg. 18B.

There is one general conclusion to which a consideration of the present case has led me. I can see no legal need for the Home Secretary to make any affidavit. The onus of proof is not on him. In addition, there is a definite reason why unnecessary affidavits should not be made by him in *habeas corpus* proceedings under R.S.C., Ord. 59. The ordinary procedural rules about hearsay statements and the right of the other side to cross-examine are applicable, and both rules make affidavits by him almost futile. If his *bona fides* were attacked, a different position might arise, but, in the ordinary case, a letter from the Home Office addressed to the court and identifying the order made should be a sufficient substitute for the gaoler's return to the writ under the old practice, or, at any rate, an affidavit of the gaoler exhibiting the original of the order. On this, I agree with what GODDARD, L.J., says at the end of his judgment. In spite of the admirable argument of counsel for the appellant, the appeal must be dismissed with costs.

MACKINNON, L.J.: I agree that this appeal fails. I had begun to write at some length my reasons for that conclusion when I had the opportunity of reading the judgment which Goddard, L.J., is about to deliver. Finding that he had expressed more clearly what I had been writing, I thought that it was undesirable for me to complete my disquisition, and that it would suffice for me to say that I agreed with all that he had said. A subsequent perusal of the judgment of Scott, L.J., has confirmed my belief that it is unnecessary for me to set forth my reasons at length. I will therefore add only a few words.

On the application for *habeas corpus*, the gaoler or other person detaining the applicant must justify the detention. In an ordinary case, that is done by producing a legal order directing it. In this case, that must be a valid order of the Home Secretary issued pursuant to the order in council. The production of such an order in proper form would justify the detention, and *prima facie* would be conclusive. The onus of showing that the order is invalid rests upon the applicant. No evidence on the part of the gaoler or of the Home Secretary to establish the validity of the order (except proof of its signature, if that is disputed) is necessary, unless the applicant has adduced evidence of its invalidity sufficient to discharge and shift the onus of proof which rests primarily upon him.

The power of the Home Secretary to issue a valid order depends upon the fulfilment of a condition. The nature of that condition is very material. It is not the existence of an objective fact—*e.g.*, that the person concerned is an alien. It is the existence of a subjective state of mind in the Home Secretary—*i.e.*, that he has reasonable grounds for believing certain facts to exist, and, by implication, that he honestly entertains that belief. If an order asserting the existence of that state of mind and belief has been made in valid form, the onus upon the applicant of disproving its existence is obviously much more difficult to discharge than would be the disproof of one objective fact—*e.g.*, that the man is an alien. Evidence of the applicant that he does not know that there are any reasons for the Home Secretary's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call upon the Home Secretary to explain and justify the assertion of his order. In the present case, the applicant does rather more than make those general assertions or denials, and an affidavit in reply has been filed by the Home Secretary. As the evidence stands, the applicant has failed to satisfy me that the facts justifying the belief of the Home Secretary do not exist, or that the Home Secretary does not reasonably and honestly believe them. He therefore fails to show any invalidity in the order for his detention, and his application for a writ of *habeas corpus* must fail.

Goddard, L.J.: In this appeal, counsel for the appellant submitted several grounds for reversing the decision of the King's Bench Division and for supporting his contention that the applicant was entitled to an order for discharge, which, under modern practice, can now be granted after argument upon an order *nisi* or summons for a writ of *habeas corpus*.

With all these grounds it will be necessary to deal, but his main contention, to which most of the argument was addressed, was that it was for the Secretary of State to prove that he had reasonable grounds for believing that the applicant was a person of hostile associations and that it was necessary to exercise control over him. It was said that the court could not hold that there was proof of any reasonable ground of belief unless at least some of the facts upon which the Secretary of State formed his opinion were set out by him in his affidavit. It might be enough to say that in *R.* v. *Home Secretary*, *Ex p. Lees* (3) this court, upholding the King's Bench Division, were satisfied with an affidavit from the Secretary of State in precisely the same form, so far as this matter is concerned, as that sworn by him in the present proceedings. However, in deference to the argument of counsel for the appellant, and because it is desirable that there should be no misunderstanding as to the reason why an affidavit which does not set out the grounds may be sufficient, and also because of certain expressions of opinion and doubts in recent judgments on this class of application, I propose to state my reasons fully. We were also invited by the Attorney-General to say whether it was indeed necessary for the Secretary of State to have made an affidavit at all, and, as this case may form a guide for future proceedings, I think that it is right that this court should decide that point, for, if it were not necessary for the Secretary of State to have made an affidavit, it follows that that to which he has sworn cannot be insufficient. This latter question was not raised in *R.* v. *Home Secretary*, *Ex p. Lees* (3). The court then emphasised that it was not their function to act as a court of appeal from the exercise of the Secretary of State's discretion, but they did rely on the affidavit, as did the King's Bench Division, and, seeing no ground for disbelieving it, refused the application for a writ. It is said that the court has no material on which it can come to a decision as to whether the Secretary of State acted on reasonable grounds, and this raises the question as to whether the onus of proving that there were such grounds lies on the Secretary of State, or whether it is for the applicant to prove that there were not. I shall deal with this point when I come to consider whether it was necessary for the Secretary of State to have made an affidavit.

Assuming the necessity for an affidavit, I am of opinion that the Secretary of State cannot be required to set out the grounds of his belief or to give the information which led him to the opinion which he formed. It is obvious that this information is confidential, and, in my opinion, the Secretary of State's affidavit in effect claims that it is. Moreover, the Attorney-General informed the court that the Secretary of State declined to disclose the information upon which he acted, as it would be contrary to the public interest so to do. It follows that, if the applicant sought to cross-examine the deponent, the court would be obliged to uphold his objection to giving the sources or nature of his information. This result does not arise from the regulations. It is a rule of the common law. It must be assumed that both His Majesty in Council, by whom the regulations are made, and Parliament, by which they were entrusted with that power and which has the right to annul any regulation, knew of this rule, and, accordingly, realised that the Secretary of State could not be called upon to give away his information or grounds of belief. It is a rule which may work hardship on anyone in litigation with the Crown. A The privilege, indeed, extends to actions brought against persons who may have documents in their possession which belong to the Crown. In *Duncan* v. *Cammell Laird & Co., Ltd.* (10), an action for damages was brought against the builders of one of His Majesty's submarines alleging negligence, and the plaintiff sought discovery of some documents which B the defendants held subject to the directions of the First Lord of the Admiralty. He directed the defendants not to disclose them, and made an affidavit claiming privilege for the documents, which this court upheld without seeing them, holding that the claim was conclusive. Counsel for the appellant in this case went so far as to contend that the C court could not look at the affidavit because the grounds of information and belief were not stated, as is required by R.S.C., Ord. 38, r. 3. Apart from the Minister's privilege, I do not think that this rule applies to the affidavit in question. The fact to which the Secretary of State deposes is that he had reasonable grounds for his belief. That is to say, he D deposes to his own state of mind, which is a fact within his own knowledge. He is not deposing to the facts which were told him, nor to the fact that he believed all that was told him. Nor does it appear to me to be right to say, as STABLE, J., appears to have thought in *R.* v. *Home Secretary, Ex p. Budd* (9), that, in the absence of this information, the court cannot E decide whether or not the Secretary of State had reasonable grounds for his belief, and that, consequently, the prisoner must be discharged. Suppose, in an action, an issue arose whether a Minister of the Crown had received certain information. If the Minister swore that he had, although he declined to say from whom he got it, or even what it was, the court F would have to make up its mind whether or not it believed him. I see no reason whatever here for disbelieving the affidavits of Sir John Anderson and Mr. Morrison, and, as I hope to show when dealing with the question as to whether or not it was necessary for those affidavits to be filed, the applicant's affidavits are no evidence to the contrary. It G follows that, as in *R.* v. *Home Secretary, Ex p. Lees* (3), the applicant is not entitled to an order on this ground alone.

I now consider whether it was necessary for the Secretary of State to have made an affidavit in this case. If it were possible to say that under the regulation he had to act in a judicial capacity, the matter H would, I think, be clear. If a person committed by order of a court applies for a writ, and on a return, or, in accordance with the modern practice, by an affidavit showing cause, the gaoler produces an order of commitment regular on its face, and showing that the prisoner was committed for matter within the authority of the court, the court to which application for the writ is made, not being a court of error or of appeal, cannot entertain the question whether or not the authority has been properly exercised: *per* PATTESON, J., in *Stockdale* v. *Hansard* (11) and LORD DENMAN, C.J., in *Middlesex Sheriff's Case* (12). However, there can, I think, be no doubt that the A Secretary of State, in making these orders, acts wholly in an executive, and not in a judicial, capacity. Counsel for the appellant accordingly relies on the advice of the Judicial Committee, delivered by LORD ATKIN, in *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*) (4), at p. 670. In my opinion, however, that passage does not mean that, B where the executive has detained a person under statutory authority (and the regulations have the force of statute), he can, merely by saying, "I don't know why I have been detained," oblige the executive to prove that every condition necessary to the making of the order has been fulfilled. In my opinion, once it is shown that he is detained under a C warrant or order which the executive has power to make, it is for the applicant for the writ to show that the necessary conditions for the making of the warrant or order do not exist. The matter can be tested, I think, by considering the former procedure, largely superseded by Crown Office Rules now embodied in R.S.C., Ord. 59, which, while altering the practice, D retain the substance of the older procedure. Formerly, on a suggestion supported by affidavit that a subject was unlawfully detained, the court issued the writ of *habeas corpus*. It was directed to the gaoler, or whoever had the actual custody of the applicant, and the court might, and frequently did, cause notice to be given to the person alleged to be E responsible for the imprisonment. The writ directed the gaoler to have the body of the prisoner before the court, and directed him to return also the cause of the imprisonment. The gaoler would, in the ordinary course, return the warrant or order which committed the prisoner to his custody, and the court would then examine it. It is not without significance F that in the first instance the return had not to be verified by affidavit, for, until impeached, it was to be regarded as true: *Watson's Case* (13). The prisoner was then allowed, if he could, to controvert the return, and this right is expressly preserved by the Habeas Corpus Act, 1816, s. 4. By sect. 3, the court is given power to inquire into the truth of G the return by affidavit. In *Middlesex Sheriff's Case* (12), LORD DENMAN, C.J., speaking of that section, said, at pp. 291, 292:

> On the motion for a *habeas corpus*, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged.

H

There was no question in that case as to the warrant of imprisonment being anything but good, and, in my opinion, all that the court can do under sect. 3, where the justification in the return is a warrant or order regular on its face and showing a good cause of commitment, is to inquire if in fact it is a true warrant, and if it is in truth the warrant of the committing authority, and if it is under that warrant that the prisoner is in fact detained. However, this still leaves it open to the subject, under sect. 4, to controvert the return, in which case the onus is upon him. This, in my opinion, is what the Judicial Committee held the subject was entitled to do in *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*) (4). The deportee had raised two contentions, among others—namely, (i) that he was not a native chief, and (ii) that he had not been deposed, and that, accordingly, the governor had no power to deport him under the ordinance under which he had purported to act. The Supreme Court in Nigeria had held that they could not go behind the order, but the Judicial Committee decided that they were bound to inquire into the subject's contentions. LORD ATKIN instances the analogy of a deportation order under the Aliens Act, and it seems to me that what he means is that a person ordered to be deported could raise the contention that he was not an alien, and, therefore, the Secretary of State could not deport him. It does not mean that, if he is an alien, the court can inquire why the order was made. It is clear, I think, that it would be for the subject to prove that he was not an alien, and this is what I understand to have been the opinion of both LORD ATKINSON and LORD WRENBURY in *R.* v. *Halliday, Ex p. Zadig* (1). That case arose in the last war under reg. 14B, which, though in different terms from those of the regulation now under consideration, conferred a power of internment upon the Secretary of State. The actual point in the case was whether the regulation 14B was *ultra vires* the Defence of the Realm Act. The appellant had been detained as a person of hostile origin, as it was admitted that he was. In that case, what was necessary to give the Secretary of State jurisdiction to make an order was that the competent military authority had recommended the expediency of detaining the particular person, but, for the purpose of what the court has now to consider, it is, I think, material to notice that LORD ATKINSON, in speaking of the order, said, at p. 274 :

> And in view of that fact, which is not disputed [the hostile origin], it sets out that the Secretary of State, being duly recommended in the manner prescribed, makes an order that the appellant shall be interned for the purpose of securing the public safety and the defence of the realm. The order thus sets out upon its face all the requirements necessary for its validity if the regulation under which it purports to be made be valid. On that assumption it shows upon its face jurisdiction to make it.

Observe that nothing is said as to any obligation of the Secretary of State to show that he had in fact been recommended to make the order. However, I understand from this passage that, had the appellant been able to show that he was not of hostile origin, or that no recommendation had been made, he would have succeeded. Then LORD WRENBURY says, at p. 308 :

> If his case were that he had neither hostile origin nor associations he could have his writ of *habeas corpus* on the ground that that was so, and if he established the fact he would be discharged.

That in terms puts the onus on the applicant, and I think the conclusion is that the applicant can controvert the return, and, if he proves his case—

and it is for him to prove it—he will be discharged. In my opinion, neither the affidavits made by the prisoner in this case are, nor were those in *R.* v. *Home Secretary*, *Ex p. Lees* (3), anything like enough to controvert the return. I use the expression "the return," as the affidavit of the A Secretary of State is the modern equivalent of the return. They do not show that the Secretary of State had no reasonable grounds for making the order by saying: "I do not know why the order was made." It may be said that this is a hardship, because the prisoner cannot know what reasons the Secretary of State had. It is for that very reason, I think, B that the regulation has provided the safeguards of ensuring that the prisoner shall have the opportunity of putting his case before the advisory committee, and the even higher safeguard of requiring the Secretary of State to make a monthly return to Parliament of the action taken by him under the regulation, thus giving the legislature an opportunity C of disapproving any particular order, and thereby controlling the actions of the Minister.

Counsel for the appellant in his careful and learned argument contended that *Bushell's Case* (14), and, indeed, he said, all the cases, showed that the onus was on the Secretary of State. I cannot agree. In *Bushell's Case* D (14), the return showed that the prisoner as a juryman had been committed for returning a verdict of acquittal *contra plenam et manifestam evidentiam*. The return therefore showed, not only the fact that he was committed by a court of law, but also the grounds upon which the court had committed him, and so the grounds could be looked at. It was held E that these grounds were not sufficient in law. If, in a return, the grounds shown are insufficient in law, the discharge of the prisoner must be ordered. For the reasons I have already given, I think that *R. v. Halliday, Ex p. Zadig* (1) is directly against the contention of counsel for the appellant, and *Bushell's Case* (14) does not, in my opinion, support it.

F I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit. It must depend on the ground on which the return is G challenged, but, where all that the prisoner says in effect is, "I do not know why I am interned, and I deny that I have done anything wrong," that does not require an answer, because it in no way shows that the Secretary of State had not reasonable cause to believe, or did not believe, otherwise.

H Before dealing with the subsidiary points raised by counsel for the appellant, I will deal with the question whether para. (8) of the regulation itself takes away the right to apply for a writ. It is said that, if it does not, the words "shall be deemed to be in lawful custody" are otiose, and it is claimed that, if the order purports to show that the prisoner is detained under the regulation, he must be deemed to be in lawful custody. I do not think that this is the meaning of, or the reason for, the clause.

If the order has been irregularly made, the prisoner is not detained in pursuance of but despite the regulation. It is to be noted that the Aliens Restriction Order, 1916, contained a similar provision. It provided that an alien might be put on board a ship and detained in such manner as the Secretary of State directed, and that, while so detained, should be deemed to be in lawful custody. In *R.* v. *Chiswick Police Station Superintendent, Ex p. Sacksteder* (15), I think that Pickford, L.J., at p. 584, took the same view as that which I have expressed of this provision. The object of the clause, in my opinion, is to provide that, once an order of detention is made, the person named in the order may be kept in custody anywhere, and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment, which he can do later.

The other points made by counsel for the appellant can, I think, be disposed of shortly. It appears that, when, under cl. (5) of the regulation, the prisoner was informed of the grounds on which the order had been made against him, and was furnished with particulars to enable him to present his case to the committee, those grounds stated that he had been concerned in acts prejudicial to the public safety, instead of saying that he was of hostile associations, which was the ground on which in fact the order was made. This was unfortunate, but the prisoner was not, and could not have been, in any way prejudiced. He had been served with a true copy of the actual order, and the particulars given to him, or at least most of them, clearly stated why he was regarded as of hostile associations. He had the two documents, and he could have called the attention of the committee to the discrepancy, but he did not. Moreover, a mistake in the document served on him after he was in custody cannot, in my opinion, invalidate the original detention, or render its continuance invalid. It is the actual order signed by the Secretary of State which is the governing document, and it is this document which the return should disclose. If the appellant could show that he was in some way prejudiced or had suffered damage, it may be that he could bring an action against somebody, or it may be that, if no notice was served on him, he could obtain a *mandamus*, but, in my opinion, his detention is in no way invalidated. Nor does the later document served on him in truth show that in fact he was detained for some reason other than that which the original order stated, because the particulars show that a case existed, if the facts were believed, for regarding him as of hostile associations.

The other point was that he complained that he had not been informed of his right to make representations to the Secretary of State. The Divisional Court regarded this complaint as untrue, and I agree with their opinion, so no more need be said. In any case, it is a satisfaction to know that the prisoner's case has been heard by the committee, and, with the particulars before them, I cannot doubt that they applied their minds both to the question of whether the prisoner was of hostile associations and to any objections to the order which he had to make. With the result of their deliberations we are not concerned. In my opinion, this appeal fails on all grounds, and should be dismissed.

To avoid any misunderstanding, I desire to add that, both in the present case and in *R.* v. *Home Secretary*, *Ex p. Lees* (3), the applicants themselves
A exhibited to their affidavit copies of the orders under which they were detained, and no question was raised as to the accuracy of the copies. However, cases may arise where persons who are detained, whether under defence regulations or otherwise, do not, and perhaps cannot, inform the court of the order or warrant under which they are detained. In such a
B case, if the court sees fit to grant an order *nisi* or summons to show cause, it will be necessary for the person who has the custody of the prisoner to make an affidavit exhibiting the order or warrant under which he detains the prisoner. Although, as I have pointed out above, the old procedure did not require a return to be verified, at any rate in the first instance,
C modern practice does require an affidavit, and care should be taken in these cases under the regulations to exhibit the actual order signed by the Secretary of State, which alone is the authority for detaining the prisoner.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

D

Solicitors : *Oswald Hickson, Collier & Co.* (for the appellant) ; *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re WINSLOW HALL ESTATES CO. UNITED AND GLASS BOTTLE MANUFACTURERS LTD.'S, CONTRACT.

[Chancery Division (Bennett, J.) **July 28, 29, 1941.**]

Sale of Land—Notice of requisition order served pending completion—Possession not taken by government before actual completion—Incumbrance—Implied condition.

A contract for sale of land, which was subject to the National Conditions of Sale, fixed Jan. 25, 1941, as the date for completion and stated that there was a requisitioning notice by the War Office affecting a minor part of the property. On Jan. 24, 1941, the vendors' solicitor intimated to the purchasers that he had been told that the whole property was about to be requisitioned, and on Jan. 25, 1941, the purchasers received a letter from the Commissioners of Works and Public Buildings giving formal notice that the whole of the property sold was requisitioned and requiring immediate possession. The vendors' solicitor was not ready to complete until Feb. 3, 1941, but at that date the Office of Works had not taken possession of the property. It was contended that the requisitioning notice was an incumbrance which the purchasers could require to be cleared off before completion and that, one requisitioning notice being mentioned in the contract, there was an implied condition that the property would be conveyed subject to no other such notice :—

Held : (i) on the facts, at the time for completion the vendors were in a position to give vacant possession.

(ii) the requisitioning notice was not an incumbrance upon the property.

(iii) the vendors had not contracted that there would be no other requisitioning notice in respect of the property.

[**EDITORIAL NOTE.** The judgment herein considers fully the position where, under a contract for the sale of land in the usual form, the sale from the purchaser's point of view is rendered nugatory for the time being by the service of a requisitioning notice. The practical result is that purchasers will in future have to insert a special condition that the service of such a notice or notice of the intention to serve such a notice to become operative before or immediately after the actual completion of the sale shall make the sale voidable at the option of the purchaser. The facts of this case show clearly that the date mentioned in the special condition should be the date of actual completion and not the date fixed for completion.

As to Incumbrances and Sale of Land, see HALSBURY, Hailsham Edn., Vol. 29, pp. 256-258, paras. 341, 342 : and for Cases, see DIGEST, Vol. 40, pp. 144-148, Nos. 1140-1178.]

Vendor and Purchaser Summons asking for a declaration that the vendors are unable to show a good title. The facts are fully set out in the judgment.

R. F. Roxburgh, K.C., and *C. V. Rawlence* for the applicants.

Sir Herbert Cunliffe, K.C., and *C. E. Shebbeare* for the respondents.

Bennett, J. : This is a purchasers' summons brought under the Law of Property Act, 1925, s. 49, in connection with a contract, dated Dec. 23, 1940, for the sale of some freehold premises referred to as the Mansion House at Winslow in the county of Buckingham. By the summons as amended, the applicants ask for a declaration that the respondents are unable to show a good title to the premises comprised in the above-mentioned contract or to perform their part of the contract,

in that they have impliedly contracted, or are estopped from denying that they have contracted, to give vacant possession and cannot do so, or, alternatively, that they have impliedly contracted to convey free from any incumbrance not mentioned in the contract and are unable
A to do so, or that they have impliedly contracted that the land is sold and will be conveyed subject to no requisitioning notice other than that expressly mentioned in the contract.

The contract, which was made on Dec. 23, 1940, has these special conditions in it. The third special condition is :

> B The day for the completion of the purchase shall be Jan. 13, 1941.

The fifth special condition is :

> The vendors sell as absolute owners.

The seventh special condition is :

> The property is sold subject to the requisitioning notice by the War Office (if
> C still in force) with regard to the stables and rooms over butler's room and half garage.

There are no other relevant special conditions. Reference was made in the course of the argument to the National Conditions of Sale, 13th Edn., condition 10, forming part of the contract between the parties. Condition 10 is in these terms :

D

> Without prejudice to the duty of the vendor to disclose, on or before the date of the contract, all latent easements and other liabilities known to the vendor to affect the property, the property is sold subject to any land tax, tithe redemption annuity, rights of way and water, and other rights, easements, quasi-easements, liabilities and public rights affecting the same, and to tenancies, whether mentioned in the particulars of sale or not, and to the rights and claims of tenants not attributable to breaches of obligations imposed on the landlord which occurred and
> E ought to have been discharged before the sale. No error, mis-statement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or ommission relates to a matter materially affecting the description or value of the property) shall any compensation be allowed either by the vendor or purchaser in respect thereof.

There is no other material provision in the contract between the parties.
F Very soon after the contract had been signed, the vendor, desiring to hold a sale by auction upon the premises before the date fixed for completion—namely, Jan. 13—found himself unable to hold that sale by auction and complete upon the agreed date, and, accordingly, letters passed between the parties which ended in the completion date of Jan. 25, 1941, being
G substituted for Jan. 13, 1941, the date inserted in the contract which the parties originally drafted. On Jan. 24, 1941, according to the evidence, an oral intimation was given by the vendor's solicitor to the purchasers that a representative of the Commissioners of Works had been to Winslow and had stated that he was requisitioning the property. On Jan. 25 there
H was served upon the purchasers a printed form. It was addressed to the purchasers, and was in these terms :

> Emergency Powers (Defence) Act, 1939. Defence (General) Regulations, 1939. Dear Sirs, Address of Premises : Winslow Hall, Winslow, Bucks, including the portion already requisitioned. I have to inform you that the government have come to the conclusion that it is essential in the national interest, to take immediate possession of the above premises occupied by you. I must therefore ask you to take this letter as formal notice that the Office of Works are entering on and taking possession of the premises forthwith and also intend to requisition such of the

> chattels therein as may be required. An inventory of all chattels in the premises will be drawn up and the items which are requisitioned will be indicated thereon. In the meantime you are desired not to remove any of the contents of the premises except by arrangement with this department. They regret any inconvenience that this may cause you and ask for your co-operation. Yours faithfully, R. C. Rose. For and on behalf of the commissioners of H.M. Works and Public Buildings.

The receipt of that letter was acknowledged by the purchasers, or by somebody on their behalf, on Jan. 25, 1941, the date on which the parties had agreed that completion was to take place. As a matter of fact, the vendors were not in a position to complete on Jan. 25, 1941, because the conveyance which had been approved and engrossed had not been signed by all the necessary parties. That fact was intimated to the purchasers by the vendors' solicitor by a letter, dated Jan. 20, 1941, in which he says:

> As the various persons to execute this deed are distributed over the country, I am afraid it will not be possible to complete on the 25th instant. I have sent the deed to the company, however, and will send you completion statement as soon as possible.

Then on Jan. 27, 1941, the vendors' solicitor wrote to the purchasers' solicitors as follows:

> The sale of the contents of the above [Winslow Hall] is completed, and the property is now vacant; and you can enter into possession as soon as you like. I enclose completion statement, and will let you know so soon as the deed is executed.

On Jan. 31, 1941, the vendors' solicitor wrote to the purchasers' solicitors that the conveyance had been executed and had reached his London agents, and on Feb. 3, 1941, the vendors' solicitor wrote to the purchasers' solicitors that the house was still empty. Since the correspondence between the parties, the Office of Works has taken possession of the property the subject of the contract. The exact date upon which possession was taken has not been proved, but there is an affidavit by Russell Smith from which it is plain that on June 10, 1941, His Majesty's government were in the exclusive occupation of the premises comprised in the contract of sale, and there is no doubt that possession of those premises was taken under the Defence (General) Regulations, reg. 51, made under the provisions of the Emergency Powers (Defence) Acts, 1939 and 1940. Reg. 51 (1) provides as follows:

> A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land.

It is common ground between the parties that that is the regulation under which possession of the property the subject-matter of the contract has been taken by the Office of Works. I am not going to decide what the position of the parties would have been if possession of the property had been taken by the Office of Works before the date fixed for completion, or before the vendors were in a position to complete. It would appear from the evidence that on Feb. 3, 1941, the vendors were in a position to hand the purchasers a properly executed conveyance of the property and to give them vacant possession of the property which had been contracted to be sold. The letter of Feb. 3 makes that last fact clear, and the letter of Jan. 31 makes it clear that the conveyance executed by the parties was ready to be handed over to the purchasers. On those facts, it seems to me that the applicants, the purchasers, have not proved that at the critical date—namely, Feb. 3, 1941—before the summons was issued, the vendors were unable to give effective possession of the land. They were in a position to do that before the summons was issued on Mar. 10, 1941.

The next point taken on behalf of the purchasers was that the notice served upon them by the Office of Works on Jan. 25, 1941, was an incumbrance. There is no provision in the Emergency Powers (Defence) Acts, 1939 and 1940, and there is no provision in the regulations to which I have been referred which makes it incumbent upon the Office of Works, or upon any other competent authority, to exercise the powers which reg. 51 gives them to give notice of their intention so to do to persons whose property they propose to take under the provisions of the regulation. It seems to me really a polite intimation on the part of the government that they propose to act, and it does not, in my judgment, create any greater incumbrance upon the land of the purchasers which it is proposed to take under this regulation. Anybody's land in Great Britain to-day is liable to be taken under the provisions of this regulation. In my judgment, it is not possible to hold that the notice of Jan. 25 created an incumbrance so as to prevent the vendors from performing the contract into which they had entered.

The third ground upon which the applicants, the purchasers, seek a declaration that the respondents have failed to perform their obligations under the contract is that they have impliedly contracted that the land will be conveyed subject to no requisitioning notice other than that expressly mentioned in the contract. The notice expressly mentioned in the contract is a requisitioning notice by the War Office with regard to the stables and rooms over the butler's room and half garage, and there seems to have been a notice served by some billeting office, a notice which has since been withdrawn, but the mere fact that in the contract there is reference to that billeting notice does not seem to me to be a matter from which I ought to imply, or can imply, that the vendors had contracted that no other requisitioning notice would be served in respect of the property by any other government department.

On the grounds which I have indicated, it seems to me that the applicants are not entitled to the relief which they claim. As I have said, I am not deciding what the position would have been if possession had actually been taken before the vendors were ready and willing to complete. I am deciding it upon the grounds which I have indicated only.

Summons dismissed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash* (for the applicants); *Heywood & Ram*, agents for *Philip Wood*, Buckingham (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

B. S. LYLE, LTD. *v.* PEARSON AND MEDLYCOTT.

[Court of Appeal (Scott, MacKinnon and Goddard, L.JJ.), **July 23, 1941.**]

Moneylending—Re-opening transaction—Loan at high rate of interest—Principal and interest consolidated in new loan at moderate rate of interest—Moneylenders Act, 1900 (*c.* 51), *s.* 1.

The plaintiffs, registered moneylenders, lent a borrower £100 on Mar. 14, 1939, on a joint promissory note of the borrower and a surety, the interest being 150 per cent. per annum. On June 13, 1939, a further £200 upon the same terms was borrowed. At some time prior to Jan. 1, 1940, a sum of £75 was repaid. On Jan. 1, 1940, when £490 was owing in respect of principal and interest, the plaintiffs took a new promissory note made by the same parties, under which the latter agreed to pay £490 with interest at the rate of 25 per cent. per annum. It was contended that the court had no power to re-open the transactions previous to the last note of Jan. 1, 1940, which, being at a moderate rate of interest, could not be attacked :—

Held : in the circumstances, the court had power under the Moneylenders Act, 1900, s. 1 (1) to re-open all the transactions back to the first note of Mar. 24, 1939. The moneylenders having given no evidence as to the borrower's position, the sums owing from Mar. 24, 1939, would carry interest at 48 per cent. up to Jan. 1, 1940. From that date the interest would be 25 per cent. until the date of judgment in the court of first instance and thereafter 4 per cent. The repayment of £75, not having been appropriated to capital, must be appropriated to interest.

[**EDITORIAL NOTE.** The contention here was that, where loans had been consolidated in a new note, the court could not re-open the previous transactions. Acting on this view of the law, it appeared to be thought that it was possible to lend money at a relatively high rate of interest and then subsequently consolidate several loans at such interest, or one loan and the interest, in a new loan at a moderate rate of interest. When action was brought upon this last note, a claim to re-open the whole matter was said to be barred by the decision in *B. S. Lyle, Ltd* v. *Castle* (1). The Court of Appeal have examined that authority and find the contention is wholly unwarranted. A very similar case was before Asquith, J., only a few days before the decision herein. He arrived at the same result on a consideration of the above authority, and this decision approves his decision which was read to the court. The form of the order made on the appeal is of interest to those dealing with cases of this kind.

As to Re-opening Transactions, see HALSBURY, Hailsham Edn., Vol. 23, pp. 201-206, paras. 305-309 ; and for Cases, see DIGEST, Vol. 35, pp. 212-216, Nos. 375-432.]

Cases referred to :

(1) *B. S. Lyle, Ltd.* v. *Castle* (1938), 158 L.T. 242, n. ; Digest Supp.

(2) *Re British Games, Ltd.*, [1938] Ch. 240 ; [1938] 1 All E.R. 230 ; Digest Supp. ; 107 L.J.Ch. 81 ; 158 L.T. 239.

(3) *B. S. Lyle, Ltd.* v. *Chappell*, [1932] 1 K.B. 691 ; Digest Supp. ; 101 L.J.K.B. 185.

(4) *Cory Brothers & Co.* v. *Mecca, Turkish S.S.* (*Owners*), *The Mecca*, [1897] A.C. 286 ; 12 Digest 478, *3905* ; 66 L.J.P. 86 ; 76 L.T. 579.

Appeal by the second defendant, Mrs. Medlycott, from a judgment of Cassels, J., dated Apr. 2, 1941. The facts are fully set out in the judgment of the court delivered by Goddard, L.J.

Phineas Quass for the appellant.

C. T. Le Quesne, K.C., and *A. S. Diamond* for the respondents.

GODDARD, L.J. [delivering the judgment of the court]: This is an appeal from a judgment of CASSELS, J., in a moneylender's action. He gave judgment for the plaintiffs for a sum of some £600, which was not arrived at by any precise method of calculation, but was arrived at by taking £536 17*s*., the amount which was claimed on the writ, and adding the difference to represent interest which the plaintiffs were willing to take upon the loan from the date of the writ down to the date of judgment. The matter arose in this way. The plaintiffs, who are registered moneylenders, were approached by Captain Pearson on Mar. 24, 1939, and asked to lend him a sum of £100. They lent him that sum on a joint and several promissory note being made by Captain Pearson and the present appellant, Mrs. Medlycott, who is the only defendant before the court. They joined in the note, and it is abundantly clear, of course, that, as between Captain Pearson and Mrs. Medlycott, the relationship was that of principal and surety. No one suggested otherwise. Captain Pearson had no money. Mrs. Medlycott signed the note. She became liable, but she was none the less in the position of surety, as was well-known to the plaintiffs. The interest charged was at the exceedingly high rate, especially considering that it was a transaction in which the plaintiffs were insisting upon a surety, of 150 per cent. for a period of one month. On June 13, 1939, a further £200 was borrowed by Captain Pearson. Mrs. Medlycott again joined in the note, and again the interest was at the rate of 150 per cent. At some time or another, a sum of £75 was paid to the plaintiffs by the defendants, and at the material time in this action, which was Jan. 1, 1940, a sum of £490 was still owing. Thereupon a new promissory note was made by these two defendants, under which they agreed to pay the sum of £490 with interest at the rate of 25 per cent., and it was for that that they were sued in the action, bringing the amount at that time up to £536 17*s*. The reason why the moneylenders entered into this last transaction, in which the interest was at the seemingly exceedingly moderate rate of 25 per cent., was that they thought that they had found a loophole in the Moneylenders Act, 1900, by reason of the decision of this court in *B. S. Lyle, Ltd.* v. *Castle* (1), reported in the form of a footnote to *Re British Games, Ltd.* (2). If the plaintiffs and others of their fraternity think that that case affords the loophole which they seem to think they have found, the sooner they disabuse their minds of it the better. The defendant in this case had put forward a counterclaim to have the whole of the transactions re-opened, on the ground that only £300 had in fact been lent, of which, as I say, £75 had been repaid, and that the interest charged on those loans was harsh and unconscionable, thereby making the third transaction harsh and unconscionable. The judge took the view, on the authority of *B. S. Lyle, Ltd.* v. *Castle* (1) and *B. S. Lyle, Ltd.* v. *Chappell* (3), that he could look at the last transaction only, and, finding it a loan of £490 with interest at 25 per cent., he came to the conclusion that there was nothing at all to show that the transaction was harsh or unconscionable, and, as the rate charged was under 48 per cent., if nothing else could be looked at, it was for the defendants to have attacked the rate of interest, and not for the plaintiffs to have supported it, and, therefore, he gave judgment for the whole amount. In the opinion of this court, this shows an entire misapprehension of the position under the Moneylenders Act, 1900, and we do not think that *B. S. Lyle, Ltd.* v. *Castle* (1) decides anything of the nature which it is said that it decides. In the first place, the decision in *B. S. Lyle, Ltd.* v. *Chappell* (3) is a clear authority in favour of the defendant in this case, showing quite clearly—and, indeed, an inquiry had been ordered in that case—that, in a series of transactions of this sort, the court can order the re-opening of all the transactions which led up to the last transaction. Indeed, it is perfectly clear that they could do it under the Moneylenders Act, 1900, s. 1 (2). However, it is said that the law has been in some way altered by the decision in *B. S. Lyle, Ltd.* v. *Castle* (1) which, if it does decide what the moneylenders appear to have thought it decides, counsel for the respondents admits would lead to a somewhat startling result. There is a shorthand note of that judgment, and I think that, when the judgment is carefully looked at, it does not decide anything approaching what the judge seems to have thought that it decided. In that case, GREER, L.J., speaking of *B. S. Lyle, Ltd.* v. *Chappell* (3), said, at pp. 242, 243:

> It would seem that SCRUTTON, L.J., had come to the conclusion [in *B. S. Lyle, Ltd.* v. *Chappell* (3)] that the matter could be re-opened and treated as one transaction. In my opinion, however, the judgment of the other members of the court is not to the same effect, and I desire to keep open for future decision any question as to what the real decision in that case was. Having heard the judgment of the trial judge read, I have come to the conclusion that he considered the transactions from beginning to end, and that, on the assumption, which for the present purpose I assume to be right, that he was entitled to do so, he then came to the conclusion on that basis that there was on the particular facts of the case nothing harsh and unconscionable in what had been charged on the loans originally.

Then GREER, L.J., went on to consider the question of compound interest, and he held, I think, that, for the purpose of considering whether compound interest was charged (which offends against the Moneylenders Act, 1900, and brings certain consequences in its train), one had to look at the last transaction as though it were a separate transaction, and that, therefore, one could not say that compound interest had been charged. In the earlier case of *B. S. Lyle, Ltd.* v. *Chappell* (3), the decision turned entirely upon the form of the memorandum. The question was whether the memorandum was good, and the court held that it was. They held that the memorandum which recited the loan of a certain amount was a good memorandum, although money had not actually been handed over, but it had been taken as if it had been handed over and handed back to cancel out the old loan. I see that GREER, L.J., said, at p. 243:

> It may be that, in order to determine the question whether there is some compound interest, it is necessary to determine whether the last transaction must be considered by itself. In my judgment, the Moneylenders Act, 1900, s. 1, means that, before the judge is entitled to re-open the transaction, he must come to the conclusion that the loan liability from which the borrower desires to be free contains something which is harsh and unconscionable, and that then, being so satisfied, he may re-open the transaction from beginning to end and reduce the interest or make an account between the parties which he considers is fair and right. But, in my judg-

> ment, *B. S. Lyle, Ltd.* v. *Chappell* (3) decides conclusively that, if the transaction means that the money is lent to the borrower and that the borrower with that money pays off the old loan, the court is no longer in a position to treat the transaction as a mere renewal, notwithstanding the observations of Scrutton, L.J.

However, in that case Greer, L.J., was not considering, and the court was not considering, a counterclaim by the defendant to have all these transactions re-opened. They were simply considering whether, on this one transaction, it could be said that there was compound interest, and there was no point in the court in that case considering whether, on the defendant's counterclaim, these old transactions could be looked into under subsect. (2), not under subsect. (1), of the Moneylenders Act, 1900, s. 1, because the trial judge had found that there was nothing harsh and unconscionable in those earlier transactions, and, therefore, there was nothing to go into on the counterclaim. It is not the least authority for the proposition which the judge seems to have thought it was that the Moneylenders Act, 1900, can be dodged in this patent and almost shameless way, so that, having lent money at a harsh and unconscionable rate of interest, the moneylender can get out of any inconvenience and difficulties into which that may put him by entering into a transaction embodying all the previous loans and interest in a new promissory note and charging some low rate of interest on that, and then suing the defendant upon it as soon as he has made default. The result is that this appeal succeeds.

Another question which arises is as to whether we should order judgment or a new trial. Under the Moneylenders Act, 1900, as 150 per cent. was admittedly charged upon the first loan, it must be for the moneylenders to justify it, and no one can say whether the interest on the last loan was justifiable at 25 per cent. until he knows what the true transactions were as we now know them, and that they included sums of money which had been lent at 150 per cent. I say nothing as to whether or not it is possible to justify interest at 150 per cent. where there is also a surety. It may be, I dare say, but it is for the plaintiffs to prove that that rate, being over 48 per cent., is reasonable. They gave no evidence at all on the subject. They never showed that they had applied their minds to it. Some reliance is placed on the fact that the defendant at some time gave some dishonoured cheques, but the plaintiffs have to justify this interest of 150 per cent., and, of course, the judge never applied his mind to that one way or the other, because he thought that this decision (which, as I have said, this court thinks he misunderstood) forbade him to go into the matter.

The consequence is that the matter stands in this way. The Moneylenders Act, 1927, provides that, if the moneylender is to recover more than 48 per cent. interest, he has to justify the higher rate of interest. Counsel for the defendants says that he is content to agree to 48 per cent., and with that the moneylenders will have to be content. The result of the case is that the appeal will be allowed with costs.

The figures are to be agreed on this basis. £100 was advanced on Mar. 24, 1939, and is to carry interest at the rate of 48 per cent. per annum until Jan. 1, 1940, and the sum of £200 is to carry interest at that rate from June 13, 1939, to Jan. 1, 1940, but they are to be taken with rests at the date of any repayments ; interest is to be calculated at those rates subject to credit being given for the payments that have been made and the interest to be calculated as from those dates ; as from Jan. 1 to the date of the trial, the interest will be at 25 per cent. A

Le Quesne, K.C.: Under that order, will the payments, therefore, be deducted from interest primarily ? *Cory Brothers & Co.* v. *Mecca, Turkish S.S. (Owners), The Mecca* (4) decides this quite clearly. When the payments were made to us, they were not made to us on the basis that they were to go in reduction of capital. It was, therefore, open to us to use them primarily in reduction of interest. B

Scott, L.J. : Mr. Quass, that, I think, is right.

Quass : Is not the position this, that, if they are allocated in any particular way, they have to be allocated under the 1927 Act *pro rata* between capital and interest ? C

Le Quesne, K.C.: Not when the rate is stated.

Quass : Not when the rate is stated, but the whole matter here has been re-opened and your Lordship is substituting for the original transaction a new transaction. D

Scott, L.J. : I think that the payments, if they were not allocated to capital, must be treated as having been payments made on account of interest, but that will be on account of the interest really due pursuant to the order of the court.

Appeal allowed with costs. E

Solicitors : *Arthur Dollond & Co.* (for the appellants) ; *M. A. Jacobs & Sons* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MONCKTON *v.* MONCKTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), **July 31, 1941.**]

Divorce—Desertion—Insanity—Deserting respondent received as temporary patient—Whether statutory period interrupted—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2.

In Dec., 1937, a wife quarrelled with her husband and asked him to leave her, which he did. The husband had given her no cause to act as she did, and this, therefore, constituted desertion by the wife. Subsequent letters proved that she was still of the same mind down to 1939. In Dec., 1939, she was received into a mental hospital as a temporary patient and later re-graded as a voluntary patient. At that time she was writing penitent and affectionate letters to her husband, asking him to arrange a holiday for her on her discharge from the hospital. The husband, being then in the Army and under orders to go abroad, could not arrange this. He did, however, go to see her, when she reverted to her unfounded accusations against him and said that she did not wish to see him again. The husband later tried again to obtain a reconciliation but failed. The question was whether the reception as a temporary and later as a voluntary patient was sufficient to stop desertion running during the necessary period of 3 years. It was found as a fact that during the time of this detention the state of the wife's mind was such that she could form an intention of returning to her husband or not as she wished :—

HELD : in the circumstances of this case, the mental disease did not destroy the *animus* necessary to form an intention to desert, and desertion for 3 years immediately preceding the presentation of the petition was proved.

Williams v. *Williams* (1) *distinguished.*

[**EDITORIAL NOTE.** In *Williams* v. *Williams* (1) the Court of Appeal held that a period of insanity by destroying the necessary *animus* to desert prevented the period of desertion from running. The question here is whether the respondent was insane within the principle there applied. It is found that admission to a mental hospital as a temporary patient is not such a state of insanity as necessarily involves the presumption that the patient cannot form an intention to continue desertion or to end it, and, therefore, the intention of the party during that period can be inquired into and there is no automatic bar to a decree as there is where the party is certified insane. The position of a temporary patient was considered in another connection in the recent case of *Benson* v. *Benson,* [1941] 2 All E.R. 335 ; Digest Supp. It will be noted that the statutory definition of a temporary patient is one who is suffering from mental illness but is for the time being incapable of expressing himself as willing or unwilling to receive treatment. To that extent the patient must be treated as incapable of forming an opinion or having an intention, and the decision here is that, on the facts of this case, there was no justification for taking the view that the patient was unable to have an intention on other matters, in particular, on the matter whether or not she was willing to return to her husband. The decision is obviously based on a fine distinction and it may be that other courts will take a different view, and, in any event, it leaves it open to the court in any other case to find on the facts that the patient was incapable of having the necessary intention.

AS TO DIVORCE ON THE GROUNDS OF DESERTION, see HALSBURY, Supp., Divorce, para. 971 ; and FOR CASES, see DIGEST, Vol. 27, p. 319, Nos. 2974-2977.]

Cases referred to :

(1) *Williams* v. *Williams,* [1939] P. 365 ; [1939] 3 All E.R. 825 ; Digest Supp. ; 108 L.J.P. 140 ; 161 L.T. 202.

(2) *Rushbrook* v. *Rushbrook,* [1940] P. 24 ; [1939] 4 All E. R. 73 ; Digest Supp. ; 109 L.J.P. 1 ; 162 L.T. 222.

Husband's Petition for divorce on the grounds that the wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition. Desertion began in Dec., 1937. Between Dec., 1939, and Jan., 1940, the wife was a temporary patient under the Mental Treatment Act, 1930, s. 5, for a period of one week.

B. Mark Goodman for the petitioner.

The respondent did not appear and was not represented.

Henn Collins, J.: Of the facts of this case I have very little doubt, and I may state them broadly. The respondent lived in her own house—a nursing-home, I think it was—and the petitioner with her, but in Dec., 1937, after a quarrel, she asked him to clear out and to take all his kit with him. She was perfectly sincere in that, and he went, and she showed by her subsequent letters that she continued of that mind. I have no doubt that that was desertion by her—because the husband had given her no cause for it—as from Dec. 23, 1937, or it may have been a day or two after that. That state of things continued uninterruptedly from then until Dec. 13, 1939, when, owing to her mental condition, the respondent wife was received into the Warlingham Park Hospital as a temporary patient. She was re-graded as a voluntary patient on Dec. 20, 1939, and from that hospital she was finally discharged on Jan. 22, 1940. As late as Dec. 20, 1939, she was writing penitent and affectionate letters to her husband and asking him to try to arrange a holiday for her when she was discharged from the hospital. Again, on Dec. 23, 1939, she wrote to him in the same sense, when she was expecting her discharge from the hospital in about three weeks. In the meantime, the petitioner, the husband, was ordered abroad to France with his regiment, and he left for France on Jan. 9, 1940. Meanwhile, however, he succeeded in getting a privilege leave, which enabled him to go and see his wife. Her attitude then was quarrelsome to start with, her grievance being that he had not arranged to get her away for a holiday, and, as the interview continued, she became more and more quarrelsome. The upshot was that she reverted to all the accusations of infidelity and so on which she had been making against him throughout the married life, and finally she said that she never wanted to see him again. That was the note on which they parted. When the husband returned from France, he again tried to obtain a reconciliation, but the wife's attitude was unchanged.

If for the moment I may regard the period of the wife's detention in that hospital as being nominal, I have not the least hesitation in saying that, on those facts, for the three years preceding the presentation of the petition the respondent had deserted the petitioner. However, I have to take account of the period between Dec. 13, 1939, and Jan. 22, 1940. For one week of that period the wife was a temporary patient, and for the rest of the time she was a voluntary patient.

The Mental Treatment Act, 1930, s. 5 (1), which deals with temporary patients, provides as follows :

> Subject to the provisions of this section, a person who is suffering from mental illness and is likely to benefit by temporary treatment but is for the time being incapable of expressing himself as willing or unwilling to receive such treatment may, on a written application duly made in accordance with the provisions of this section but without a reception order, be received as a temporary patient for the purpose of treatment . . .

That subsection involves, in a sense, a definition of the mental disqualifications of the person entitled to temporary treatment, and it is said that in this case there is a wholly different state of mind from that which the Court of Appeal had before them in *Williams* v. *Williams* (1), in which the respondent was certified as insane.

In *Williams* v. *Williams* (1) the Court of Appeal, by a majority (MacKinnon, L.J., giving reasons for dissent, but not dissenting), held that, in a case of desertion, an intention to desert must be proved or imputed throughout the whole period of three years before the commencement of the suit, but, in the case of a certified person, no such inference or imputation can be drawn, because, in the words of Sir Wilfrid Greene, M.R., at p. 370 ([1939] 3 All E.R., at p. 828) :

> . . . there is, generally speaking, no capacity to have the *animus* necessary to take such a step, or to give to it the quality of volition required to produce a legal result.

Some further light has been thrown on that by the judgment of Langton, J., in *Rushbrook* v. *Rushbrook* (2), where it was sought to say that one could tender evidence as to the actual state of mind of a certified lunatic so as to show that there were lucid intervals, or that during the whole of the period of the lunacy he was capable of forming a judgment or having the *animus* to which Sir Wilfrid Greene, M.R., refers. However, Langton, J., sums up his judgment by saying that that is not the proper reading of the decision of the Court of Appeal in *Williams* v. *Williams* (1), which allows no such question of fact to be entered into at all.

It is clear to me, therefore, on authority, that I cannot consider the medical evidence as to the actual state of the respondent's mind if there is no distinction on the facts between a temporary patient and a certified patient. Is there a distinction in fact ? I think that there is. All I can learn (without the aid of the doctor) from the fact that the wife was received as a temporary patient is that she was a person suffering from mental illness and incapable of deciding of her own motion, of her own mind, whether or not she ought to go into the hospital. That leaves me with no adverse evidence as to her state of mind except to that extent. Am I to infer that she had no will in the other matters of life, and was incapable of forming an opinion, or of having an intention ? I do not feel constrained, on the facts, to say that that is the proper view, and I think that this case is distinguishable, on the facts, from *Williams* v. *Williams* (1) in the Court of Appeal.

For what it is worth, I also have the medical evidence, which, of course, I could not consider but for the distinction I have drawn between the facts in this case and those in *Williams* v. *Williams* (1) and *Rushbrook* v. *Rushbrook* (2). I could not have considered that evidence if I had felt myself to be within the facts of *Williams* v. *Williams* (1) and *Rushbrook* v. *Rushbrook* (2), but the evidence in this case is that the wife was capable of forming an opinion that she did not want to go back to her husband. At first, I thought that evidence was directed only to the latter end of the time when she was a voluntary patient, and when that attitude became clear, at any rate as to the end of that period, from her letters. What the doctor said to me, however, was that his answer applied over the whole period during which she was in his care, which was roughly five weeks, and covered the whole of the sojourn in the hospital, and, if that question of fact is, on the authorities, open to me—as I think it is, for the reasons I have given—I find as a fact that during the whole of that period she had a mind sufficient to form an intention of returning or not, as the case may be.

In those circumstances, I am deciding this case upon its own facts, and perhaps I ought not to say more. However, while I am upon the point, I should like to add that, untutored by higher authority, my own inclination would be to say that desertion is the intentional disruption of the matrimonial *consortium* against the will of the other spouse. It is a state of things produced by that act—which, of course, must be an intentional act, from the very description of it—and a state of things which results from that act, and is continued until it is put an end to, as SIR WILFRID GREENE, M.R., has pointed out, by supervening *consensus*, as by a separation agreement *bona fide* made, by the return of the spouse, or by an offer made in good faith to re-establish the matrimonial life, and, unless one of those three things happens, the state of desertion continues. If one then frames those facts in, as it were, a pleading, in order to ascertain where the burden of proof lies, it will be found, after proof by the petitioner of the original act of desertion, to lie upon the respondent to show that it had been brought to an end in one of those three ways. If, for any reason, that spouse cannot give the necessary proof, the petitioner succeeds. Is the deserting spouse to be relieved of that burden of proof on its being shown that he or she was for moments, months, or, it may be, years, incapable of forming an opinion by reason of insanity ? As I say, my own answer would be in the negative. Insanity would deprive the defaulter temporarily or for a longer period of the *locus penitentiae* which was open to him or her, but it would not affect the matter otherwise. However, I am wiser now, and I know better, in the light of the judgment of the Court of Appeal. I have only stated what was my unenlightened state in order to say how much indebted I am to the judges who have corrected me. Therefore, the petitioner is entitled to a decree.

Decree nisi granted.

Solicitors : *Zeffertt, Heard & Morley Lawson* (for the petitioner).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

Re an Intended Action between V. L. CHURCHILL & CO., LTD. AND LONBERG.

[COURT OF APPEAL (Lord Greene, M.R., Clauson and du Parcq, L.JJ.), **July 28, 1941.**]

A *Practice—Service—Substituted service—Proposed action against alien in enemy-occupied country—Service by advertisement in newspaper published in neutral country and circulating in country where alien resides.*

The appellant company desired to commence proceedings against a person resident in enemy-occupied territory. The proposed defendant resided in Copenhagen, and the appellant company asked for an order B for substituted service of notice of a writ. It was proposed to insert an advertisement, giving notice of the action, in a Swedish newspaper which was stated to have a circulation in Copenhagen :—

HELD : the law does not permit constructive service, and, as in the present case there was nothing to show that the advertisement would be likely to come to the knowledge of the proposed defendant, an C order for such substituted service could not be made.

Porter v. *Freudenberg* (1) *followed.*

[**EDITORIAL NOTE**. The possibility of substituted service in enemy-occupied countries is a matter of importance at the present time and the investigation of the possibilities of service by advertisement in a newspaper published in a neutral D country contained in the judgment herein explores what would appear to be the only method by which such service might now be effected. The fundamental requisite for substituted service was laid down in *Porter* v. *Freudenberg* (1) and it is essential to show a reasonable probability that notice of the writ will come to the proposed defendant. In the present circumstances, it was held that the plaintiffs had failed in this respect, and the proposed substituted service was disallowed.

AS TO SUBSTITUTED SERVICE, see HALSBURY, Hailsham Edn., Vol. 26, pp. E 29, 30, paras. 42, 43 ; and FOR CASES, see DIGEST, Practice, pp. 329-336, Nos. 481-546.]

Case referred to :

(1) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel (S.) & Rosenfeld, Re Merten's Patents,* [1915] 1 K.B. 857 ; 2 Digest 160, *302* ; 84 L.J.K.B. 1001 ; 112 F L.T. 313.

APPEAL from a decision of UTHWATT, J., in chambers, refusing to make an order for substituted service of notice of a writ. The plaintiff, a British subject, was a company registered in England. The defendant G was a Dane living in Copenhagen, and was for the time being under German jurisdiction. The plaintiff company and the defendant entered into a contract in 1932. The facts of that contract may be shortly stated in this way. The parties were to pool certain patents and certain information, and the defendant was to have certain shares in the plaintiff H company. Neither was to do business in the territory of the other. It was upon this contract that the proposed action was to be brought.

J. Norman Daynes, K.C., and *C. A. J. Bonner* for the appellants.

The respondent did not appear and was not represented.

Daynes, K.C.: As regards the jurisdiction to order substituted service of notice of a concurrent writ, there is not much difficulty. There was a question in *Porter* v. *Freudenberg* (1) as to whether a concurrent writ could be served against an enemy alien and as to whether notice of it could be served upon him. The full Court of Appeal dealt with that matter, and LORD READING, L.C.J., expressed the view that there was no reason why substituted service of notice of a writ should not be permitted. R.S.C., Ord. 9, r. 2, and R.S.C., A Ord. 67, r. 6, apply to substituted service. After the decision in *Porter* v. *Freudenberg* (1), the legislature dealt with the matter specifically in an Act to facilitate proceedings against enemy aliens in certain cases, and the Legal Proceedings against Enemies Act, 1915, was passed. Although that Act was repealed by the Statute Law Revision Act, 1927, B a practice was established under it. At the present time, there may be sufficiently wide power under R.S.C., Ord. 11, r. 1, and R.S.C., Ord. 9, r. 2. The Act of 1915 has not been re-enacted for the purposes of the present war, and the jurisdiction of the court is derived from the rules and the practice which is left undisturbed by the repeal of the Act of C 1915. At one time, one could not effect service of a writ out of the jurisdiction. It was at one time not possible to have substituted service except where there could be personal service. A direction on the matter has been given in the King's Bench Division by VISCOUNT CALDECOTE, L.C.J., reported [1940] W.N. 456. Having regard to R.S.C., D Ord. 27, r. 15, the making of the order asked for in this case would do no harm.

LORD GREENE, M.R.: In this appeal, the appellants invite the court to override a decision of UTHWATT, J., who refused to make an E order for substituted service of a notice of a writ of summons in the manner for which the plaintiffs prayed, or at all. The action is one in respect of which a writ could properly be served out of the jurisdiction, and it is one in which, upon the facts, an order for substituted service of notice of the writ, in accordance with what was said in *Porter* v. F *Freudenberg* (1), could be made. There is only one question on the appeal, and that is whether the method of substituted service which is proposed by the plaintiffs is one which satisfies the test by which this court is bound. It is said in *Porter* v. *Freudenberg* (1), a case of the highest authority, as it was a decision of the full Court of Appeal, that [p. 888]: G

> In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted.

This court then laid down considerations which a judge in chambers must have in mind when dealing with applications of this kind. He H must satisfy himself as to the practical impossibility of actual service, and then he must satisfy himself [p. 889]:

> . . . that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.

That carefully chosen language in a considered judgment of that weight is not to be whittled away and this court is bound to act up to the standard there laid down. The question is, therefore, whether the proposed method of substituted service satisfies that test. All possible means of getting notice of the writ to the proposed defendant in Denmark have been carefully and conscientiously explored by the plaintiffs' solicitors, and the result of their inquiries, which were very frankly and fully put before us, shows that there is one possible channel, and one only, by which notice of the writ may be brought to the notice of the proposed defendant. That channel is by way of publication in a Swedish newspaper which is said, in a letter from the Press attaché to the Swedish Legation, to have a certain circulation in Denmark, principally in Copenhagen, where the proposed defendant lives. Exactly what that means does not clearly appear. We are told, and it appears clear, that the German authorities take every possible step to prevent notice of proceedings against persons in Germany or German-occupied territory reaching those persons, and to what extent it would be possible for such a notice in a Swedish newspaper to escape the German censorship does not appear. If the evidence be taken at its face value, and if ordinary efficiency be attributed to the German censorship, it would seem highly improbable that a notice of this kind could ever get through that censorship so as to get into Denmark at all. Even if it did get into Denmark, it seems to me that we do not know enough, and, in the circumstances, cannot know enough, as to the chances of this particular newspaper reaching this particular defendant.

Upon the whole matter, I have come to the conclusion that the test laid down has not been satisfied in this case. I am bound to come to that conclusion, and I am not entitled to be influenced by the fact that there is no possible method whereby there would be any chance of getting the writ to the notice of the proposed defendant. The English courts do not admit constructive service, as has been pointed out in *Porter* v. *Freudenberg* (1). I cannot help thinking that, if we were to accede to this application, we should be doing the very thing which English law does not permit us to do. Accordingly, in my opinion, the appeal must be dismissed.

Before concluding, however, I should like to refer to one matter which has been brought to our attention. A notice, dated Nov. 17, 1940, and signed by VISCOUNT CALDECOTE, L.C.J., with regard to service of process in Germany and in countries occupied by Germany is reported [1940] W.N. 456. It refers to the fact that the German government has refused to serve notice of writs forwarded by the United States Embassy, and says that recourse must be had to the ordinary practice of substituted service, which may be by advertisement. Then it says something about proof of inability to effect personal service. That notice is one which, if I may say so, correctly states what the practice should be, but it seems clear from what we have been told that the reference to advertisement is being understood in King's Bench Chambers as meaning, for example, that an advertisement inserted in THE TIMES would be sufficient to bring the writ to the notice of an intended defendant in Germany or in German-occupied territory. One thing is quite certain, and that is that, in putting that reference to advertisements into that notice, VISCOUNT CALDECOTE, L.C.J., was putting it in as a reminder of one of the methods of substituted service and was not intending A for one moment to do what, of course, he could not do—namely, modify in some way the law as laid down in *Porter* v. *Freudenberg* (1). It is unnecessary to say that he could not have had any such intention, but it is desirable to call attention to the matter, because it seems that it has been misconstrued. To publish in THE TIMES an advertisement B purporting to bring to the notice of somebody in Germany the fact that a writ has been issued against him and giving him 16 days in which to appear reduces the procedure of the courts to a solemn farce, and, if there is any such impression in King's Bench Chambers and elsewhere, it must be removed. The particular cases of advertisement which have C been brought to our attention, are, of course, cases in which we have not before us the facts which were before the masters who made the orders. It may be that in those cases there were some special facts which would justify the court or a master in deciding that an advertisement of that kind would in all reasonable probability be effective to bring D knowledge of the writ to the notice of the defendant. Though I am not able, at the moment, to say that those orders are wrongly made, if there be any such practice as I have indicated, it ought to stop.

CLAUSON, L.J.: I agree.

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GODDARD, L.J.: I agree.

Solicitors: *Evill & Coleman* (for the appellants.)

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re FRASER TAYLOR'S APPLICATION.

[CHANCERY DIVISION (Morton, J.), **July 30, 1941.**]

Emergency Legislation—Mortgage—Application for leave to appoint receiver—Whether mortgagee must give prima facie evidence that power to appoint has arisen—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*).

In an application by a mortgagee under the Courts (Emergency Powers) Act, 1939, for leave to exercise any remedy which may be available to him by way of appointment of a receiver, the mortgagee is not obliged to show a *prima facie* case that the power to appoint a receiver has arisen.

Re Royal Bank of Scotland's Application (1) *distinguished.*

[**EDITORIAL NOTE.** This is a decision of practical importance. At first sight, it might seem more convenient that the mortgagee should give *prima facie* evidence that the power to appoint a receiver has arisen before details of the effect of the war upon the mortgagor's position are gone into. Upon reflection, however, it will be seen that the costs of this proof must fall upon the mortgagor by being added to the security, and, as in the great majority of cases the power would be found to have arisen, the complete exclusion of this requirement on the hearing of the summons under the Emergency Legislation will, taking the matter as a whole, have the result of preventing a considerable sum being added to the liability of mortgagors.

AS TO EMERGENCY POWERS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 420, 421, para. 621 ; and FOR CASES, see DIGEST, Supp., Mortgage, Nos. 2210d—2210j.]

Case referred to :

(1) *Re Royal Bank of Scotland's Application,* [1940] Ch. 857 ; [1940] 3 All E.R. 476 ; Digest Supp. ; 109 L.J.Ch. 439.

APPLICATION by the mortgagee, Annie Beatrice Irene Fraser Taylor, under the Courts (Fmergency Powers) Act, 1939, s. 1 (2), for leave to proceed to exercise any remedy which may be available to her by way of the appointment of a receiver of the mortgaged property. The facts are fully set out in the judgment.

Raymond Jennings for the applicant.

W. F. Waite for the respondent.

MORTON, J. : By the summons, the mortgagee under the legal charge asks that she may be at liberty to proceed to exercise any remedy which may be available to her by way of the appointment of a receiver of the property comprised in that legal charge—namely, 85, Shaftesbury Road, and certain other properties in Brighton. In his argument, counsel for the respondent to this summons has raised a general question of importance. He submits that, when a mortgagee asks for leave under the Courts (Emergency Powers) Act, 1939, s. 1 (2) to proceed to exercise any remedy which is available to him by way of, *inter alia*, the appointment of a receiver, it is incumbent upon the applicant to make out by evidence, a *prima facie* case that the right to appoint a receiver has arisen. The practice in regard to these applications is set out in a Chancery Practice Direction which was issued by the Chief Master on Nov. 15, 1939. So far as material, it is as follows :

> 2. In applications under sect. 1 (1), (2), (3), of the Act, it shall not be necessary in the first instance to support the application by any affidavit. 3. In applications under sect. 1 (2) (*a*) [the section in question in the present case], the mortgage deed, debenture or other document under which the applicant seeks to exercise his power shall be produced to the master and be entered on his notes and be read in the order. Costs of a mortgagee will not be assessed or dealt with, the applicant being left to his ordinary remedy of adding the costs to his security.

That is the practice which is followed in regard to these applications, but the submission of counsel for the respondent is that that practice is wrong, and that the applicant has to make out a *prima facie* case, which he can only do by evidence that the power to appoint a receiver or the power of sale under the Law of Property Act (as the case may be) has arisen. It is manifest that, if the application is not supported by any affidavit, and if the applicant merely produces his mortgage deed, the court will not be in a position to say whether or not the power under the Law of Property Act has arisen. Counsel for the respondent drew attention to the fact that, in the case of an application for leave to institute proceedings for foreclosure or for sale in lieu of foreclosure, a *prima facie* case is made out by the production of the mortgage itself, showing that the date for payment had expired, but he said—and he said rightly—that the mere production of the mortgage does not show one way or the other whether the statutory power of sale or the statutory power to appoint a receiver has arisen, and that the mortgagee ought to be compelled to make out a *prima facie* case. With that submission I entirely disagree. In my view, when an application of this kind comes before a master or a judge, the court will not consider whether or not the power of sale or the power of appointing a receiver has arisen. There is no reason why that question should be considered by the court, because, if leave is given, it is only leave to the applicant to proceed to exercise any remedy which is available to him by way of, for instance, the appointment of a receiver. The giving of leave removes the obstacle which is created by the Courts (Emergency Powers) Act, 1939. The result is that, if the applicant has such a power, he is at liberty to exercise it, but the court has in no sense to determine whether or not the power has arisen. If applicants were forced to produce evidence on each occasion on which the power had arisen, the result would be to add enormously to the costs. It would not add enormously, perhaps, to the costs of each individual application, but, when one considers how many of these applications are made, to insist upon evidence of that kind would, in the aggregate, impose a very severe burden on the mortgagor, for whom the Act was intended to provide some protection, because, in the ordinary way, the costs of the application would be added to the security and would thus be an additional burden on the mortgage property. I can see no good reason why the applicant should have to make out such a *prima facie* case. Counsel for the respondent has referred me to a decision of Bennett, J., in *Re Royal Bank of Scotland's Application* (1). That was a case in which it was apparent on the face of the summons that the power in question in that case had not arisen. The summons was in the following form :

> Let [then follow the name and address of the respondent] attend before Master JELF in chambers of the judge [then follows the address and so on] on the hearing of an application on behalf of the Royal Bank of Scotland that they, having given notice on May 15, 1940, calling in all moneys due to them under or by virtue of the abovementioned equitable charge, may on the expiration of three months from the said May 15, 1940, proceed to exercise all powers or remedies which may be available to them and in particular enter into possession of and sell the property charged by the equitable charge.

It was thus apparent that the power of sale had not yet arisen. BENNETT, J., said, at p. 858 ([1940] 3 All E.R., at p. 477) :

> Upon the face of the charge which is the foundation of this application, the bank are not at the moment in a position to realise the security and they will not be in a position to do so until Aug. 15, 1940.

The date of the hearing was July 9, 1940. I think that, when BENNETT, J., referred to that which appeared on the face of the charge, he meant this. It was provided by the charge that the mortgagee should have :

> . . . all the powers conferred on mortgagees by the Law of Property Act 1925 in like manner as if these presents had been a mortgage by deed . . .

Thus, BENNETT, J., knowing, as he did, that the notice calling in the mortgage money was not sent until May 15, 1940, could say that, upon the face of the charge, which refers to the statutory power, the bank was not at that moment in a position to realise the security. Then he proceeds as follows, at p. 858 ([1940] 3 All E.R., at p. 477) :

> The relevant date at which the court is to consider whether a respondent is unable immediately to perform his obligation must be that at which the person entitled, but for the Courts (Emergency Powers) Act, 1939, to exercise some remedy, is in a position to exercise it.

Then he pointed out that the position of the respondent might change between the date when he was hearing the case and Aug. 15, and he said, at pp. 858, 859 ([1940] 3 All E.R., at p. 477) :

> In my judgment this application made to-day is on the face of the summons premature. It has been adjourned to me for the determination of the question which I have decided in favour of the respondent and . . . I propose to adjourn it back to chambers . . .

Then he deals with the costs, and I need not read that part of the judgment. In my view, that case is no authority at all for the proposition that the applicant has to make out a *prima facie* case that the power of sale or the power to appoint a receiver has arisen. It was a case in which it was deliberately and intentionally brought to the notice of the court, in order that the particular question might be decided, that the power of sale had not in fact arisen. In those circumstances, BENNETT, J., thought that it would be premature to deal with the matter. I cannot regard that case as being one which supports in any way the argument put forward by counsel for the respondent.

Application granted. Costs added to the security.

Solicitors : *E. H. North & Co.*, agents for *A. Fraser Taylor & Son*, Hove (for the applicant) ; *Jennings, Son & Ash*, agents for *Gates, McCully & Buckwell*, Brighton (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

MEIKLE AND OTHERS *v.* MAUFE AND OTHERS.

[Chancery Division (Uthwatt, J.), **April 29, 30, May 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 21, July 31, 1941.**]

Copyright—Infringement—Architectural work—Extension of existing building—Copyright in building—Ownership of copyright—Copyright Act, 1911 (*c.* 46), *s.* 35 (1).

In 1912 the defendants, H. & Son, Ltd., employed a firm of architects in connection with buildings which were erected shortly afterwards. The contract with the architects contained no special terms as to ownership of the copyright in the plans or buildings, and, the plans and design being their original work, the copyright became vested in them. The evidence showed that before and during the erection of the building the possibility of its extension southwards was discussed. In 1935, H. &. Son, Ltd., having determined upon the southward extension, engaged the defendant M. as architect in connection therewith. M. incorporated in the extension certain features which distinguished the original building. The facade was repeated with minor alterations, and the interior was reproduced to a substantial degree. In an action for infringement of copyright by the plaintiffs, the present owners of any copyright that vested in the architects employed in 1912, the defendants contended (i) that there could be no separate copyright in a building as distinct from the copyright in the plans on which the building was based, and that if there was a separate copyright in the building, the copyright belonged to the builder, (ii) that it was an implied term of the contract of 1912 that H. & Son, Ltd., should have the right to reproduce the plans of the original building in the extension so that both should form one architectural unit :—

Held : (i) copyright might subsist in the building which embodied the architect's plans.

(ii) having regard to the definition of architectural work in respect of which protection was given in the Copyright Act, 1911, s. 35 (1), the copyright in the building vested in the architects.

(iii) no term giving H. & Son, Ltd., the right to reproduce in the extension the design of the original building could be implied into the contract between them and the plaintiffs.

(iv) the measure of damages was not the amount of profit which would accrue from employment as architect of the infringing building, nor the fee which might be charged for a licence to reproduce the design, though that might be taken into account among the other circumstances. In the circumstances of this case, the damages should be assessed at £150.

[**EDITORIAL NOTE.** This is a decision on a point that has not previously been considered at any length in any reported decision. An extension of a building is usually required to conform to the general design of the main building, and, after the decision herein, it will be necessary either to employ the same architect or to obtain a licence to reproduce any features of the existing building which it is desired to incorporate in the extension. The matter seems to be one of considerable importance at the present time when many quite modern buildings have been destroyed by enemy action. If these are to be rebuilt substantially in their old form, it may well be that there will be a breach of copyright, unless proper precautions are taken. The reason why the matter has not been extensively litigated before would seem to be, as stated in the judgment, that architects have been more ready to accept the compliment implicit in the repetition of their design than to insist upon a legal right.

As to Copyright in Artistic Works, see HALSBURY, Hailsham Edn., Vol. 7, pp. 527, 528, para. 830 ; and for Cases, see DIGEST, Vol. 13, pp. 210-212, Nos. 451-480.]

Cases referred to :

(1) *Southern Foundries (1926), Ltd.* v. *Shirlaw*, [1940] A.C. 701 ; [1940] 2 All

E.R. 445; Digest Supp.; 109 L.J.K.B. 461; *affg.*, [1939] 2 K.B. 206; [1939] 2 All E.R. 113.

(2) *Fenning Film Service, Ltd.* v. *Wolverhampton, Walsall & District Cinemas, Ltd.*, [1914] 3 K.B. 1171; 17 Digest 80, *14*; 83 L.J.K.B. 1860; 111 L.T. 1071.

(3) *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q.B. 147; 17 Digest 80, *13*; 65 L.J.Q.B. 262; 74 L.T. 83.

(4) *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.*, [1936] Ch. 323; [1936] 1 All E.R. 177; Digest Supp.; 105 L.J.Ch. 150; 154 L.T. 367; *affd.*, [1938] 4 All E.R. 389.

(5) *Chabot* v. *Davies*, [1936] 3 All E.R. 221; Digest Supp.; 106 L.J.Ch. 81; 155 L.T. 525.

ACTION for damages for alleged infringement of copyright. The facts are fully set out in the judgment.

Charles E. Harman, K.C., and *James Mould* for the plaintiffs.

K. E. Shelley, K.C., and *Guy T. Aldous* for the defendants.

UTHWATT, J.: In or about 1912, the defendants Heal & Son, Ltd., following an idea that they had had in mind since 1910, employed the firm of Smith & Brewer as architects in connection with buildings which shortly afterwards were erected on part of the premises of Heal & Son, Ltd., in Tottenham Court Road. In 1935, Heal & Son, Ltd., employed the defendant Maufe as their architect in connection with an extension of the original building. The claim in the action is made by the sequels in title of Smith & Brewer, who allege that buildings put up in accordance with Maufe's plans, and the plans themselves, infringe the copyright vested in the plaintiffs both in the artistic design of the buildings for which Smith & Brewer were responsible and in the relative plans. Apart from questions of law and the question whether the later buildings and plans reproduce the work of Smith & Brewer, the main defence is that it was implicit in the transaction between Heal & Son, Ltd., and Smith & Brewer that Heal & Son, Ltd., and any architect employed by them should stand authorised to do what in fact has been done.

I propose to deal in the first instance with the relevant facts, so far as they relate to the original building, and the question of the extent of any infringement of any copyright in the design of, and plans for, the original building and the questions arising thereon, and at a later stage to deal with the question of the implied authority. As regards all the questions involved as to the nature of the original and infringing buildings, I propose to deal with these by reference to the buildings and the design involved in them, and to regard the relative plans generally, subject to exceptions, as plans to which effect is given in the relative buildings. In the course of the opening of this case, I was invited by counsel for the plaintiffs to deal with the matter by reference to the buildings alone, but, as counsel for the defendants stated that his case was to some extent dependent on details, in the course of the hearing the plans were considered in detail. In his closing speech, counsel for the defendants agreed that this matter might really be considered by reference to the buildings alone. I personally have found that little assistance in determining the substance of the points involved in the case can usefully be derived from the plans.

The firm of Smith & Brewer which consisted of two partners, Arnold Dunbar Smith and Cecil Claude Brewer (a member of the Heal family), were employed as architects for the building operations which were begun by Heal & Son, Ltd., in 1914, and were completed in or about 1916. Those buildings, so far as they faced Tottenham Court Road, were built on land leased from the Bedford Estate, and I will refer to those lands and the buildings thereon as the northern section.

There were no special terms contained in the contract for the employment of the firm as architects. They were appointed architects, and the matter was left at that. In connection with the buildings, many plans were prepared by Smith & Brewer, and it was admitted by the defendants in their defence that the northern section was built in accordance with plans submitted by Smith & Brewer, though the fact that the firm were "the authors" of these plans within the meaning of the Copyright Act, 1911, was not admitted. As regards the copyright in the plans of the building in the northern section, I find as a fact that the plans and the design were the joint work of the two partners done in the ordinary course of their partnership business, that the plans in accordance with which the building was erected were, subject to some matters of detail to which I refer below, the original work of the partners working together, and that, accordingly, the copyright in those plans became vested in them for their partnership purposes, and, subject to the point of law to which I will refer later, the copyright in the artistic design of the building was also vested in them. It is clear on the evidence that both partners in fact collaborated in the work. Indeed, it would appear from some of the published comments on their work that, by their diverse and complementary qualities, they were well-fitted for combination. If indulgence in atmosphere was the natural bent of one, the other could be relied upon to see that his partner's ideas were translated into tactile effects. However this may be, the result in this case was that, in accordance with their plans, a novel building of an artistic character was put up in Tottenham Court Road.

I do not propose to describe the building in detail. The general features of the facade were that the shop windows on the ground floor lay within a colonnade on the line of the street pavement, and that above the ground floor the general design was an alternation of triple and single bays, until the entablature was reached. The design was one which was capable of repetition in any extension. As regards the interior of the building—I speak generally—each of the floors in question was designed as a single room, and in each of these rooms there was a series of regularly spaced stanchions which supported the beams. The exceptions as regards original work to which I have referred are of minor importance. They relate to matters of detail. With respect to the facade, Armitage, an architectural carver and modeller, was responsible in whole or in part for the design of certain of the details which entered into the facade of the building as constructed. For the design of the cast iron enrichment around the window frames, for the lion's head appearing on the first-floor level, and for all but one of the cast iron trade panels he was wholly responsible, and for the design of the cornice he was partly responsible. It may be that he was partly responsible for other minor features embodied in the building. The matters with which Armitage was concerned were specialist's work on which he was engaged with a view to carrying out in a satisfactory way ideas placed before him by the architects as to details incorporated in the architects' design. In the general design embodied in the building, there is no evidence that anyone other than Smith & Brewer played any part.

With respect to the interior, the stanchions and beams presented no novel features. The caps, rails and bases of the stanchions do not contain any feature not commonly used by architects, and I attribute no originality to Smith & Brewer as regards the form of these features. They were, however, responsible for the layout of the rooms. That is the main point, and these exceptions do not affect my view as to the authorship of the plans or of the general design embodied in the facade or the rooms. I may add that it was not contended by the defendants as regards either the facade or the interior that the design embodied in the building was not such as not to be susceptible of architectural copyright.

It was contended on behalf of the defendants that there could not be a separate copyright in a building as distinct from a copyright in the plans on which the building was based, and that, if there were a separate copyright in the building, the copyright was in the builder. In the present case, neither of these contentions is material, except in so far as the correctness of either of them may affect the quantum of damages. Upon the first contention, it is argued that the originality lies in the plan, and that, therefore, there can be none in the building which reproduces the plans. Upon the second contention, it is said that, wherever originality may lie, the author, for copyright purposes, is the builder who has built the building, and not the architect responsible for the plans. In my opinion, neither contention is well-founded. As regards these contentions, an architectural plan finds its meaning and purpose in the use to which it is put. The point of the architect's activities is not the making of plans as such, but the embodiment in the building of artistic and other ideas which he has in mind and which are contained in his plan. The plan is a means to an end, and not an end in itself. To deny originality to the artistic design embodied in a building by attributing originality only to the plans which led to the building would be to give reality to the shadow and refuse it to the substance.

As regards the second contention, to attribute for the purposes of the

Copyright Act, 1911, "authorship" of the building to the builder who has worked in accordance with an architect's plans, and under the architect's supervision, does not seem to me to be required by the terms of the Act. The architectural work of art in respect of which copyright is given is defined as: A

> . . . a building or structure having an artistic character or design in respect of such character or design.

By definition the protection is limited to the artistic character or design embodied in the building and in the making of that character or design the builder plays no part. He, like his plans, is only part of the machinery B employed in the production of the structure which embodies the design and the ideas of the architect. For copyright purposes, the author of the architectural work of art is the author of the plans. It follows that, in my opinion, Smith & Brewer are entitled to the architectural copyright in the building as well as to the copyright in the plans. C

It is now necessary to consider the evolution of the title to the copyright. As regards this, Smith and Brewer carried on business in partnership down to the date of the death of Cecil Claude Brewer on Aug. 10, 1918. By his will and codicil, proved by his executors, Maurice Brewer and Arnold Dunbar Smith, on Dec. 18, 1918, C. C. Brewer bequeathed his D share and interest in the partnership of Smith & Brewer to Arnold Dunbar Smith, and that bequest accordingly included C. C. Brewer's interest in all copyrights which had belonged to the partnership. Following on the death of C. C. Brewer, Dunbar Smith carried on business on his own account until Apr. 1, 1930, when he took the plaintiff E J. A. Meikle and one K. W. F. Harris into partnership on the terms contained in a partnership agreement dated Jan. 8, 1931. Under that agreement, Dunbar Smith brought into the partnership the goodwill of his business of an architect, retaining, however, the right to that goodwill on the expiration of the partnership. The partnership expired by F effluxion of time on Mar. 31, 1933, and on its expiration Dunbar Smith assigned his interest in the goodwill to the plaintiff J. A. Meikle.

It was not disputed by counsel for the defendants that, assuming that the copyright was originally vested in the firm of Smith & Brewer, some beneficial interest in the copyrights possessed by Smith & Brewer G was, at and prior to the date of infringement thereof, vested in Meikle, and the case was in substance argued and dealt with on the footing that Meikle was the beneficial owner of the entirety of the copyright. To complete the title of the copyright, Arnold Dunbar Smith died on Nov. 7, 1933, and the plaintiffs Clara Ellen Smith and Frank Douglas are H his executors, and, by reason of the death of Maurice Brewer on Mar. 6, 1935, are now also the executors of C. C. Brewer. It follows that between them the plaintiffs own the legal and equitable interests in the copyrights which were formerly vested in the original firm of Smith & Brewer. It may here be added that the name "Smith & Brewer" was not at any time allowed to drop. Their successors continued to use it, and Meikle and his present partner now carry on business under that name.

It is now necessary to consider the new buildings for which Maufe was responsible. These consisted of an extension (which I shall call the southern section) of the northern section and of a building lying to the east called the Albert Mews section. As regards the southern section, Maufe chose as the centre of the building as extended the southern bay of the northern section. Having done that, the design of the facade was repeated by him until he approached the southern corner. At that point, he felt himself free to give rein to a certain extent to his originality. Maufe was quite frank about his action. He thought it necessary from the point of view of design to reproduce in the southern section the features which appeared in the northern section. I have no doubt that the work which required to be done by Maufe was greater than that which an original design would have caused him. He did what he willed, but his will was determined for him. In fact, he copied from the existing building the features which distinguished it. In the facade there are, indeed, minor differences. The spacing of the pillars in the colonnade is slightly different, and the dimensions are not quite the same. The ornamentation in part of the new work differs slightly from that in the old, and there are other slight differences. It is fair to Maufe to say that no one suggests that these or the other differences to which I shall refer later were made with a view to displacing the fact of copying. Maufe's object was to make the new look like the old throughout nearly the whole of the Tottenham Court Road frontage. He succeeded in his object. There is no doubt that, until one reaches the last pillar but one facing Tottenham Court Road, there is a reproduction of the design embodied in the facade of the northern section, and, unless excused for some reason, a breach of the copyright so far as regards the facade of the northern section. This, indeed, was admitted by counsel for the defendants in his closing speech. At the southern corner, there are certain changes in the design. The columns and pillars are different, but the general motif is repeated, and here again I find that, unless excused, there is a breach of the copyright until the window of the southern side of the building which encloses the staircase is reached.

As regards the interior, I do not propose to go into all the details which were enlarged upon in the evidence given to me, or to give more than a rough description of it. It is sufficient to say that, up to and including the third floor, each floor of the building as extended is a single room. Lift-doors in the centre of the eastern wall of the extended rooms mask a lift. At the southern end of the extended building there is a staircase, and that end has no counterpart in the rooms as they were in the original building. In the basement, ground floor, and first floor, the stanchions in the southern section are in a line with those in the northern section. In the second, third and fourth floors, they lie in the northern section about two-thirds, and in the southern section about one-third, of the depth from the Tottenham Court Road frontage. The beams in the southern section are not quite so deep as those in the northern section. Speaking generally, pier caps and bases, beams, ceiling cornices, windows and window architraves and beam spacing are repeated, though there are minor differences in the spacing of the A stanchions and other matters. On the fourth floor, the mansard gallery has been influenced and again there is repetition. In the ante-room to the mansard gallery there is repetition of the design in the pier cap and base work appearing on other floors. There are minor differences in the spacing of the stanchions and in the details of the work on the B stanchions, but the general effect is that the design embodied in the interior of the northern section has been followed in the southern section. In my opinion, there has, as regards the basement and the first, second, third and fourth floors, been a repetition of the design embodied in the former rooms of the northern section, and again, unless excused, there C has been a breach of copyright. As regards the Albert Mews section, the only complaint is as regards the interior of certain of the rooms. Here there is no trace of copying at all. The rooms are different, and I find as a fact that there has not been any repetition of any work in which copyright was vested in Smith & Brewer. D

The defendants sought by their defence to justify their action on three of several grounds. Of these, two were withdrawn at the trial, and I do not propose to refer to them. The ground which remains, and with which I now propose to deal, is that pleaded in para. 3 of the defence : E

> It was agreed between the defendant company and the said Smith & Brewer that they should submit plans for the rebuilding of the said northern section. It was at all material times known to the said Smith & Brewer and to the defendant company that subsequently the southern section thereof might also be rebuilt and that in such event it was necessary that the northern and southern sections should together form one architectural unit. The said Smith & Brewer accordingly submitted the said drawings to the defendant company who accepted the same and the said northern section was built in accordance therewith. The said Smith & Brewer F were duly paid by the defendant company all proper fees and charges in connection with the said drawings and plans and their supervision of the building of the said northern section. In the premises it was impliedly agreed between the defendant company and the said Smith & Brewer that the defendant company or any architect employed by them should be entitled to reproduce the said drawings and plans and the said northern section in so far as that might be necessary so as to rebuild the said southern section to form together with the said northern section one architectural G unit.

The material facts bearing on the question of an implied term are these. There were no special terms incorporated in the contract under which Smith & Brewer were employed as architects. The original building was a complete architectural unit. The design of the facade, however, H was such as rendered it capable of repetition whether the building was extended to the north or to the south. The showrooms fronting the Tottenham Court Road again were capable of extension without alteration of character. In and prior to 1914, the defendants Heal & Son, Ltd., held the northern section of the buildings facing Tottenham Court Road under a lease from the Bedford Estate and the part of the southern section lying immediately to the south of the northern section under a lease from the City Lands Committee, the two sections being divided by a substantial party wall. It is stated in a letter of Apr. 4, 1913, that the defendants Heal & Son, Ltd., were then taking up by way of renewal a long lease of the northern section from the Bedford Estate, but had been unable to renew the lease then held by them from the City Lands Committee, which lease was due to expire in 1933. Lying further to the south, and forming the southernmost portion of the southern section, was the White Hart public-house, which was held by certain brewers from the City Lands Committee also for a term of years expiring at Midsummer, 1933. Heal & Son, Ltd., had in 1914 made some inquiries about the possibilities of acquiring the lease of the White Hart from the brewers, but nothing had resulted from those inquiries. They had not addressed any inquiries as regards this site to the City Lands Committee. Heal & Son, Ltd., in 1932 acquired a building lease of the southern section upon which the present buildings were erected. All the expert witnesses were agreed and I find as a fact that architecturally there would not be a satisfactory facade for the Tottenham Court Road block unless the original design was repeated for practically the whole of the length of the extension, and I find as a fact that, from a commercial point of view, it was desirable that the premises should appear to be one shop. Again, as regards the showrooms, the commercial needs of the business would naturally suggest that, if the building was extended, the existing showrooms should be extended and that there should not be two showrooms on the same floor.

If the showrooms were extended, then again the design of the new part, in order to be architecturally and commercially satisfactory, would have to conform as nearly as possible to the design of the old part. There is the evidence of Sir Ambrose Heal, which I accept, that, before the building was being erected, as well as in the course of its erection, he discussed with the architects the possibility of an extension southwards of the building then proposed. What the lines of that discussion were Sir Ambrose did not state. Indeed, at this distance of time he could not be expected to do so. Meikle conceded in his evidence that an extension to the south had in 1914 always been known to be a probability, and that it had always been hoped that the White Hart public-house could be included if the requirements of Heal & Son, Ltd., justified it. The question of an extension northward was not discussed, and there is no evidence that such an extension was in contemplation. Lastly, I should mention that there was some further evidence that in 1914, during the Great War, the defendants Heal & Son, Ltd., after building had commenced, tried to get the builders to agree to a cancellation of the building contract, but this attempt was unsuccessful.

It is argued that, upon this state of facts, I have to consider the question whether there is any such implied agreement as is alleged in the defence. In considering this argument, one must bear in mind the position which results from the provisions of the Copyright Act, 1911. Apart from any special bargain between the architect and the building owner, the latter is the owner of the plans prepared by the architect, but the architect owns the copyright in the plans, and also in the design embodied in the owner's building. The building owner may not, therefore, reproduce the plans or repeat the design in a new building without the architect's express or implied consent. Apart from some express or implied bargain to the contrary, the architect is free, if so minded, to repeat the building for another owner. It may well be that, where the copyright is vested in an architect, professional instincts step in and deter him from the breach of good manners involved in the repetition for a new client of a distinctive design used for a former client. A successor in title of the architect may not be moved by any such considerations. In any event, the new client desiring a distinctive building will in all probability prefer a deviation into originality. It was argued that some implication there must be. It was suggested that, unless there were some such implication, a building owner could not without breach of copyright do extensive repairs to his buildings, or reconstruct a building which had been destroyed by fire or by enemy action. It is unnecessary for me in deciding this case to determine these points, and I do not propose to express any opinion on them. I shall confine myself to the particular issues raised in this case.

The question whether or not a particular term is to be implied in a contract depends on the presumed intentions of the parties and on general reasonableness. The point of implying a term is not to impose on the parties a more reasonable or a wider bargain in lieu of that into which they have chosen to enter, but to work out the bargain they have in fact made. To indulge in the dangerous language of metaphor, the parties choose for themselves the pattern and ambit of their contract. The pattern is sometimes incomplete and threads may be woven into the pattern to complete it, and holes in the background to which the pattern is applied may be filled up, but a new pattern is not to be evolved, nor is the subject-matter to which the pattern is applied by the parties to be widened.

In the present case, the contract on which Smith & Brewer were employed could be, and was, completely fulfilled without the implication of any term. The term desired to be implied is directed to limiting the copyright which Smith & Brewer acquired as one of its results. I accept that, in any extension of the building, there was a need, from an architectural and commercial point of view, for unity of design in the facade of the extension and in the interior, and that there was a commercial need that the showrooms on each of the various floors should be one room. I accept the fact that the acquisition of a new lease of the southern section and of a lease of the site of the White Hart public-house was regarded as a commercial possibility at the date of the contract with the architects and that the architects knew of this. Nevertheless, there is another side to the matter. First, the Smith & Brewer building was such as permitted of extension. It did not as a building hold out any promise of it. It was a complete architectural unit. Secondly, the whole question of whether or not any extension should be made lay in the future. A It might or might not occur. If it occurred, Smith & Brewer might not be chosen as architects. There was no obligation to choose them. Lastly, there is nothing to show that the form which any such extension should, or might, assume was ever under discussion or consideration.

B To my mind, if the intrusive stranger whom MACKINNON, L.J., in *Southern Foundries (1926), Ltd.* v. *Shirlaw* (1) postulates as interesting himself in the formulation of the contract under discussion between the parties were to ask the question whether, under their bargain, the building owner was to be entitled to use the design embodied in the building C and incorporated in any extension to the south, he would not, I think, get the answer: "Of course." The rational answer would, I think, be: "Now you are talking about something else. Please keep to the point." I am unable to infer any such term as that for which the defendants contend. In case the matter is ventilated in another court, D and had I come to a contrary conclusion on the question of an implied term, I would hold as a fact that, if a term is to be implied, it is a term which would cover the extension which has in fact been carried out.

The question of damages remains. There is a certain amount of E authority upon the proper measure of damages. In *Fenning Film Service, Ltd.* v. *Wolverhampton, Walsall & District Cinemas, Ltd.* (2), HORRIDGE, J., following the principle laid down by LORD ESHER, M.R., in *Exchange Telegraph Co.* v. *Gregory & Co.* (3), at p. 153, stated that the damages for infringement of a copyright were at large. In *Sutherland* F *Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.* (4), LORD WRIGHT, M.R., pointing out the distinction between the case where the claim was for damages for infringement of copyright and the case where the claim was for conversion of infringing copies, stated that in the former case, at p. 336 ([1936] 1 All E.R., at p. 180) :

> G . . . the measure of damage is the depreciation caused by the infringement to the value of the copyright as a chose in action.

In *Chabot* v. *Davies* (5), a case of infringement of an architectural work, CROSSMAN, J., after stating that presumably damages were to a H certain extent at large, proceeded on the basis of considering what sum might fairly have been charged for a licence to use the copyright for the purpose for which it is used. It appears to me that the consideration on which CROSSMAN, J., proceeded is a sound basis from which to begin, but that one is entitled to take into account all the surrounding circumstances in exactly the same way as one is entitled to do in the case of the invasion of a common law right of property.

There was an argument addressed to me on behalf of the plaintiffs which requires to be specifically dealt with. Meikle stated in evidence that, had he been asked for a licence, he would in all probability have required either that he should be employed as architect for the front block—the infringing block—or that his firm should be employed jointly with Maufe as architects for the whole new building. It was argued that Meikle would have been justified in refusing a licence except on these terms, because, if he or his firm were not employed, the association of the building with the firm of Smith & Brewer would disappear. The argument then proceeded that, upon this footing, the proper basis upon which to estimate the damages was to ascertain as nearly as might be the profit which Meikle or his firm would have made if they had been employed as architects for the infringing building. The relevant figures which enter into an estimate of damages made on this basis are these. First, the total cost of the whole new building was £94,500, the cost of the infringing building (exclusive of accessories such as lighting, and so on) was estimated at £24,000, and the part of the cost attributable to the facade was estimated at £6,753. Secondly, the architects' fees payable under the R.I.B.A. scale are, for new work, 6 per cent., for alterations and additions to existing buildings, not less than 6 per cent. nor more than 12 per cent., and for sketch designs, on the basis of a *quantum meruit,* not exceeding one-sixth of those percentages. Thirdly, as regards the expectant profit, the effect of the eveidence given was that, as regards Meikle and his firm, the percentage of expenses to receipts varied considerably. The approximate percentages were, for the 3 years ending 1933, 20 per cent., for the 6 years ending 1936, 30 per cent., and for the years 1936, 1937 and 1938, 36 per cent., 60 per cent., and 60 per cent.

I do not accept this argument. It does not appear to me that an architect's profits which would accrue from employment as an architect in the infringing building are, either in the general case or in this particular case, the measure of the damages recoverable for breach of copyright in the design and plans vested in him. Where the copyright in the design or in the plans is vested in an architect competent and willing to do the proposed work, the fact that he is an architect may, I think, be taken into account among the other circumstances in assessing damages, but such profits do not provide, in my opinion, either a mathematical measure of damages or a basis upon which to estimate damages. Copyright is not the sickle which reaps an architect's profits.

I have already stated the cost of the infringing building and the extent of the infringement, and there are some other matters which were brought to my attention in connection with the question of damages. First, a practising architect would not, in the case of an important building such as the original building, repeat the design in another building, nor, I apprehend, would a new client normally desire a repetition of an existing building, and it is fairly clear to my mind that in substance the only market for licence to repeat the design was with Heal & Son, Ltd. The plaintiffs, on this basis, have lost their only market for the copyright. However this may be, the infringing building as a whole contains nothing which detracts from the charm of the original design. Secondly, there was evidence that frequently an architect would not make any charge to a brother architect who wished to repeat in an extension the design for which the former was responsible. This, in my opinion, is irrelevant upon the question of damages. Professional readiness to accept a compliment rather than to insist on a legal right is immaterial where damages for the infringement of a right are being considered. Thirdly, occasionally an architect is instructed to design a facade alone and is not engaged to carry out any other part of the work incumbent on the architect of the building, but, as the fee paid is a matter of agreement, and depends on the reputation and the presumed personal qualifications of the architect selected, it does not appear to me that the amount of the fees paid in these circumstances is of any great assistance in assessing the damages. Fourthly, some reliance was placed, and some insistence was made, on the fact that some journals contained matter which attributed the architectural work for the whole building to Maufe, and that there was some likelihood that the connection of the name of Smith & Brewer with the building would be lost. As to this, it may be observed that none of the copyrights in question is vested in the present firm of Smith & Brewer. Meikle is the only member of the firm who has any interest in them. Further, it may be added that neither Meikle nor his partner had any part or lot in the preparation of the design of the original building or the plans which it embodies, and that there still remain engraved on the wall of the original building the names of Smith and Brewer as its architects. I may add here that there is not the slightest ground for thinking that either of the defendants was in any way responsible for any misleading matter which appeared in the journals in question. Lastly, in a letter of July 26, 1935, Sir Ambrose Heal courteously explained to Meikle that his name had been considered by the defendant company when the selection of an architect was under discussion, and that the company had no doubt that Maufe would "follow out and develop in a contemporary manner Cecil Brewer's original design with the fullest sympathy and insight." To that Meikle gave an equally courteous reply, making no comment on the phrase I have quoted. Following on this, Maufe, with the correspondence between Sir Ambrose and Meikle before him, wrote to Meikle about his selection as an architect, and Meikle, in reply to Maufe's letter, stated that his best wishes were with him in his work, and that he trusted that in it he would find much enjoyment. It is conceded that these letters do not in fact amount to a licence authorising the infringement of the plaintiffs' copyright, but the defendants may well be forgiven for thinking that, *qua* Meikle, Maufe had a free hand so far as the artistic necessities of the building required him to follow the original design, and that is what Maufe has done. Taking all the circumstances into consideration, I assess the damages at £150.

Judgment for the plaintiffs. Costs reserved.

Solicitors: *Lee & Pembertons* (for the plaintiffs); *Sydney Redfern & Co.* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

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stinguished. JERRED *v.* T. RODDAM ENT & SON, LTD. [1948] 2 All R. 104.

Distinguished. BLOOMSTEIN *v.* RAILWAY EXECUTIVE. [1952] 2 All E.R. 418.

HASELDINE *v.* C. A. DAW & SON, LTD., AND OTHERS.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **June 11, 12, 13, 16, 17, July 31, 1941.**]

Landlord and Tenant—Flats—Lift—Liability of landlord for proper repair of lift—Liability to visitor of tenant of flat.

Negligence—Dangerous article—Liability of repairer—Lift—Limited contract of maintenance—Liability to user of lift.

The plaintiff, who was visiting a block of flats on the business of one of the tenants sustained injury through the breaking of the cylinder gland of a hydraulic lift. The flats were owned by the defendant D, who was in occupation of those parts of the building that were not actually occupied by the tenants. The lift had been in use for some 35 years, and its maintenance was provided for by a contract with the defendants S. Ltd., a firm of engineers, who undertook to attend once every month, to adjust, clean and lubricate the mechanism of the lifts and to furnish reports after each visit. The engineers of an insurance company also inspected the lift. There was nothing in the engineers' reports to suggest that the lifts were in a dangerous condition, though suggestions for its improvement were made. It was found that the cause of the accident was the faulty repacking of the cylinder gland by a mechanic employed by S. Ltd.:—

Held: (i) D., having employed competent contractors and having acted on their advice, was not liable to the plaintiff whether the latter was an invitee or a licensee.

(ii) (Clauson, L.J., *dissenting*) S. Ltd. were liable to the plaintiff, since through their negligence the lift had been left in a dangerous condition without any reasonable opportunity for intermediate examination.

Decision of Hilbery, J. ([1941] 1 All E.R. 525) *reversed on the first point.*

[**EDITORIAL NOTE.** The decision in the House of Lords in *Donoghue* v. *Stevenson* (1) was restricted to the case of a manufacturer, though certain observations were made that it must of necessity extend to repairers of chattels. The present decision is the first time the case of a repairer has come before the Court of Appeal and this decision, therefore, confirms the earlier decisions in courts of first instance where repairers have been held liable under this principle. The dissenting judgment of Clauson, L.J., raises in a serious form a question which has been touched upon before and that is how far the principle of *Donoghue* v. *Stevenson* (1) is limited by the principle of remoteness of damage. The former principle obviously and admittedly involves a liability to an indefinite number of persons over an indefinite period of time, and it seems clear that a point must be reached where the damage is too remote. It would not seem, however, that in the present case the damage was more remote than in *Donoghue* v. *Stevenson* (1) and the majority of the Lords Justices felt no difficulty on this point. The judgment of Scott, L.J., raises a point which will, perhaps, be unpleasant reading to those whose memories go back beyond the year 1922. When the question whether a visitor to a tenant in a block of flats was an invitee or a licensee was in issue, reference was always made to the decision in *Miller* v. *Hancock* (17), but it was generally felt that that was a decision which proceeded more from the heart than from the head. When the case of *Fairman* v. *Perpetual Building Society* (3) was taken to the House of Lords, it was thought that this matter had been settled for all time. In his judgment herein, however, Scott, L.J., has examined the opinions in that case and has found that its facts did not require the House to come to a final decision on that much debated question. Goddard, L.J., and it would seem that Clauson, L.J., agrees with him on this point, is quite clear that the statements of their Lordships on this point were not *obiter* and that the point is not now open to review. It is, however, possible that the facts of that case were not such as would raise the point in that clear-cut way that would make it a binding decision, and there is much force in the analysis of the grounds of decision by Scott, L.J., herein. However that may be, the view has generally been held for a very long time that a visitor to the tenant of a flat is only a licensee of the landlord and it must lead to considerable difficulty if that view is to be challenged again at this late stage, though both Scott, L.J., and Goddard, L.J., express the view that under modern conditions the visitor is an invitee and not a licensee. It is stated that the terms of the tenancy agreement are immaterial in such a case, but, though not yet a usual clause, it is becoming common for landlords to exempt themselves from liability to tenants in respect of lift accidents and to make the tenant indemnify them against actions by third parties. In the court below, much was said about vertical carriage, and the difficult question of gratuitous carriage was discussed. Having regard to the view taken on the facts, this question lost most of its importance on the appeal, but the judgments contain an important consideration of the difference between the liability of one who is held liable for a breach of contract and of one who is held liable in tort. While the duty owed by the contractor is higher than that of the person sued in tort, it is owed to a much more restricted class of persons, since there is no liability to a stranger to the contract. The law in this respect has undergone considerable development in this century and cannot even now be said to be settled in every respect, but a careful and exact consideration of it will be found in Winfield's Law of Tort, pp. 584-607. It should be noted that it is again stated that the case of *Earl* v. *Lubbock* (13) is concerned only with the liability in contract and has no reference to the liability in tort. If this may be taken as the settled view, one of the chief difficulties of the subject disappears. The last important matter to notice is the discussion of the limitations on the liability under the principle in *Donoghue* v. *Stevenson* (1). These, again, are stated in Winfield's Law of Tort, at pp. 578, 579, and to the matters there given the judgment of Goddard, L.J., has added an example showing the limitation placed upon the doctrine by the principle of remoteness of damage. It is here that the line of demarcation is most difficult to draw, as the judgment of Clauson, L.J., shows, and, indeed, the ultimate test would seem to be what is reasonable in all the circumstances of each particular case.

As to Liability of Landlord of Flats, see HALSBURY, Hailsham Edn., Vol. 20, pp. 337-339, paras. 405, 406; and for Cases, see DIGEST, Vol. 31, p. 102, Nos. 2394-2397.]

Cases referred to:

(1) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(2) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18.

(3) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74; 36 Digest 37, *213*; 92 L.J.K.B. 50; 128 L.T. 386.

(4) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311. A

(5) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; 36 Digest 6, *1*; 25 L.J.Ex. 212; 26 L.T.O.S. 261.

(6) *Commonwealth* v. *Pierce* (1884), 168 Mass. 165; 52 Am.Rep. 266.

(7) *Vaughan* v. *Menlove* (1837), 3 Bing.N.C. 468; 36 Digest 21, *95*; 6 L.J.C.P. 92.

(8) *Parnaby* v. *Lancaster Canal Co.*, *Lancaster Canal Co.* v. *Parnaby* (1839), 11 Ad. & El. 223; 36 Digest 43, *261*; 9 L.J.Ex. 338. B

(9) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220.

(10) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, *9*; 52 L.J.Q.B. 702; 49 L.T. 357.

(11) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; 36 Digest 10, *26*; 62 L.J.Q.B. 353; 68 L.T. 626. C

(12) *Winterbottom* v. *Wright* (1842), 10 M. & W. 109; 36 Digest 63, *407*; 11 L.J.Ex. 415.

(13) *Earl* v. *Lubbock*, [1905] 1 K.B. 253; 36 Digest 63, *408*; 74 L.J.K.B. 121; 91 L.T. 830.

(14) *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606; Digest Supp.; 101 L.J.K.B. 768; 147 L.T. 427. D

(15) *Herschtal* v. *Stewart & Ardern, Ltd.*, [1940] 1 K.B. 155; [1939] 4 All E.R. 123; Digest Supp.; 109 L.J.K.B. 328; 161 L.T. 331.

(16) *Mersey Docks & Harbour Board* v. *Procter*, [1923] A.C. 253; 36 Digest 15, *59*; 92 L.J.K.B. 479; 129 L.T. 34.

(17) *Miller* v. *Hancock*, [1893] 2 Q.B. 177; 31 Digest 99, *2380*; 69 L.T. 214.

(18) *Addie (R.) & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650. E

(19) *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212; [1937] 3 All E.R. 454; Digest Supp.; 107 L.J.K.B. 84; 157 L.T. 380; *affg.*, [1937] 1 All E.R. 698.

(20) *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219; 8 Digest 11, *44*; 72 L.J.K.B. 725; 89 L.T. 174.

(21) *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115; 36 Digest 64, *412*; 22 L.T. 140. F

(22) *Coughlin* v. *Gillison*, [1899] 1 Q.B. 145; 3 Digest 70, *117*; 68 L.J.Q.B. 147; 79 L.T. 627.

(23) *Hyman* v. *Nye* (1881), 6 Q.B.D. 685; 3 Digest 87, *211*; 44 L.T. 919.

(24) *Morgan* v. *Girls Friendly Society (Incorporated Central Council)*, [1936] 1 All E.R. 404; Digest Supp.

(25) *Latham* v. *Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 36 Digest 38, *223*; 82 L.J.K.B. 258; 108 L.T. 4. G

(26) *Maclenan* v. *Segar*, [1917] 2 K.B. 325; 36 Digest 123, *817*; 86 L.J.K.B. 1113; 117 L.T. 376.

(27) *Paine* v. *Colne Valley Electricity Supply Co., Ltd., and British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803; Digest Supp.; 160 L.T. 124.

(28) *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382; Digest Supp. H

(29) *Stennett* v. *Hancock & Peters*, [1939] 2 All E.R. 578; Digest Supp.

(30) *Buckner* v. *Ashby & Horner, Ltd.*, [1941] 1 K.B. 321; Digest Supp.

Appeals by the defendants A. & P. Steven, Ltd., and the defendant Daw respectively from a judgment of Hilbery, J., dated Mar. 26, 1941, and reported [1941] 1 All E.R. 525, where the facts are fully set out.

F. A. Sellers, K.C., and *Montague L. Berryman* for the appellants in the first appeal.

H. D. Samuels, K.C., and *F. W. Beney* for the appellant in the second appeal.

H. J. Wallington, K.C., and *H. G. Robertson* for the respondent.

SCOTT, L.J.: This appeal from a judgment of HILBERY, J., raises two questions in the law of negligence. The first is as to the measure of duty of a landlord of a block of flats towards a stranger who uses a lift for the purpose of visiting a tenant. The second is as to the measure of duty towards the same stranger of a company of lift engineers charged with negligence in the execution of a contract with the landlord whereby for a periodic remuneration they undertook, as independent contractors, to adjust, clean and lubricate the lift and to report to the landlord if any "repairs or alterations were necessary." The lift fell when the plaintiff was going up in it, and he was injured by the fall. The judge awarded him £750 damages against both the landlord, Daw, who was the third defendant, and the engineers, A. & P. Steven, Ltd., who were the second defendants. Both these defendants appeal on the issue of liability, but neither appeals on the amount of damages. The first defendant in the action was a company employed by the landlord to perform various managerial duties for him as his agent in connection with Hornton Court East, the block of flats in question, and other blocks of flats, but that company was dismissed from the action, and no question arises about it in the appeal. It will be convenient to refer to Daw as the landlord and to A. & P. Steven, Ltd., as the engineers. The plaintiff, a solicitor's managing clerk, was going to visit a client who had a flat on the fifth floor. He was shown into the lift at the ground floor level by the landlord's servant, a porter, who started to take him up. When the lift reached the second floor, it stopped, and began to descend. The descent increased in speed until the lift was suddenly arrested with a violent jerk at the bottom in the basement, causing the plaintiff a spinal injury. The lift was 35 years old. It was worked by hydraulic pressure from a public main, which supplied water at a pressure of 700 lbs. to the square inch through a control valve situated outside the mechanism of the lift but connected to the cord worked by the attendant in the lift. The mechanism consisted of the usual combination of a ram and a water cylinder, the one moving up and down in relation to the other. In the lift in question, the cylinder surrounding the ram was what moved up and down, the ram being fixed. The ram consisted of two parts, one above the other, jointed together, usually called in the evidence the upper ram and the lower ram. The lower was 13 ft. long and of a smaller diameter than the upper, originally $2\frac{7}{8}$ ins. against $4\frac{1}{2}$ ins. It was tubular, and acted as a pipe, receiving the water under pressure near its bottom end from the control valve outside and delivering it into the inside of the cylinder at a point a little below the junction of the two rams. The top end of the cylinder moved only up and down the upper and thicker ram, and did not travel downwards below the point where that ram joined the lower ram. Conversely, the lower end of the cylinder did not travel upwards above the point where the lower ram ended. The cylinder was closed at each end by a stuffing-box tightly filled with packing so as A to keep the rubbing contact between cylinder and ram watertight and prevent the water under pressure from escaping through that narrow annular space between the cylinder and the ram.

To understand the evidence as to how the accident was caused and its bearing on liability, some details of the mechanical picture are necessary. B The immediate cause of the accident was the rupture of the cast-iron gland at the bottom end of the cylinder, which suddenly let out the water. It was common ground that the top end of the cylinder had no causal connection with the rupture, nor had the upper ram. It was the ascertainment of the reason why that lower gland broke and the consequent C investigation into the design and mechanics of that part of the apparatus which necessitated examination into mechanical details both below and before us. As appears from the sketch used by the judge with the consent of all parties at the trial, the casing of the cylinder had a strong transverse bottom perforated by a hole amply large enough to D encircle the lower ram. The circular wall of the cylinder was thickened below this bottom, I suppose for purposes of strength, and ended in a thick circular flange, projecting outwards. Two long steel studs 1 in. thick were screwed into this flange of the cylinder, and projected downwards with threads on their lower ends. The circular space between E the thickened walls and the ram constituted the stuffing-box, into which split rings of packing material could be inserted from below. The lower side of this stuffing-box was open, but designed to be closed by the cast-iron gland which was of equal width with the flange of the cylinder, and contained holes to receive the two studs. The diagram shows at the F top of the gland a recessed collar left in the casting, and in it rests a gunmetal ring projecting slightly above the top of the collar and having an inside diameter only just greater than that of the ram itself. Assuming the ram to be of equal diameter throughout its length, the ring was thus calculated to reduce escape of water to a minimum—directly by fitting G closely round the ram, and indirectly in another way. The function of the packing in the stuffing-box was to grip the ram all round, to achieve which it had to be pressed tightly together. The method of effecting this was first to insert the rings of packing material into the stuffing-box and press them together, then to put the gland in position over the studs attached to H the cylinder base and push it up against the packing by hand, and finally to put the nuts on the lower ends of the two studs and screw the gland upwards so as to bring an even mechanical upward pressure to bear equally over the packing. When thus tightened up, the projecting rim of the gunmetal ring would cause an extra degree of pressure on the packing all round the ram where the two were in contact, and so would tend to prevent any escape of water at the only place where it could escape as long as the gland remained intact. The evidence makes it clear that the above was the mechanism adopted to close the exit for the water under pressure. In order to avoid stresses for which the gland was not designed, it was essential for the gland to be so adjusted by tightening the nuts evenly as to leave it absolutely square with the stuffing-box, with an equal strain on each of the two studs and the two sides of the casting. The immediate cause of the accident was that one of the two studs, and also the cast-iron gland itself, broke right across. The smaller half fell into the basement. The larger half, with the gunmetal ring, stayed on the ram. The packing remained where it was in the stuffing-box, but, the compression of the packing being released, the water was able to escape quicker and quicker. The pressure within the cylinder dropped, first to a degree which ceased to counterbalance the weight of the lift, and then rapidly to atmospheric pressure, so that the unsupported lift, gathering momentum, struck the bottom with a violent concussion.

The cause of the gland and stud breaking was the main question of fact in controversy at the trial. It was also in issue on appeal before us, in that the judge's findings on it were challenged. He held that the fracture was brought about by the co-operation of two factors.

His first factor was this. Both rams had, in the course of their long working life, become worn unevenly, though in different degrees, in such a way as to cause the diameter to vary from place to place throughout their length and so to be smaller in one part than another. This worn condition was much less serious in the lower ram than in the upper, but a technical opinion was expressed by some of the witnesses that, as the cylinder moved up the lower ram from a part which had been worn thinner to a part which was less worn, and, therefore, thicker, the unevenness was sufficient to develop a wedge-like increase of compression in the packing in the stuffing-box which would give rise to stresses in the iron gland which would, or might, have a disruptive effect. For reasons which I will state presently, I am not satisfied that the evidence justified the inference drawn by the judge that the strain so imposed on the gland was such, either in amount or in direction, as did or could have any disruptive effect on the gland, or in any way contribute to the breakdown which did take place. In order to found the legal views which I have formed on the questions of liability, it is not necessary for me to form a definite conclusion on the issue of fact involved in the judge's first factor, for, if my views are right, the engineers are liable, and the landlord is not liable, whether or not the worn ram was a contributing factor. None the less, having considered the evidence on the issue with care, I conceive it to be my duty, in case there is an appeal to the House of Lords and my legal views are overruled, to state my views on the facts relating to that factor.

The judge's second factor was very different in kind from his first, and, in my opinion, was the direct cause of the rupture of the gland. The engineers' mechanic had been adjusting the machinery of the lift on June 17, 18, 1940, pursuant to the terms of the current contract with the landlord, and on June 18, the very day before the breakdown, he had repacked the lower stuffing-box. In re-adjusting the gland, he had failed to adjust it into its proper position—namely, at right angles to the axis of the cylinder with the two nuts tightened to an equal degree on their respective studs. The result was that he left it askew, with one stud holding it more tightly than the other. The effect of this on the gland itself was, when the water pressure came on, to set in operation stresses acting laterally instead of vertically, and unevenly on the respective sides of the gland instead of evenly. In short, it gave rise to stresses to which the design of the casting was not addressed. Hence the breakdown. With the judge's finding of fact that this was a cause of the breakdown I wholly agree. The clear balance of expert opinion supported it. In addition, there was definite corroboration afforded by inspection of the broken gland, the smaller half of which showed on its inner surface a small patch of brightened iron, the size of a sixpence or shilling, adjoining what had been its bottom edge when in position. This area was bright, but not appreciably worn, as it would have been if it had been in rubbing contact with the ram for a sustained period of time, for the original machine markings made when the cylindrical surface was machined still showed clearly. When the cylinder was in motion, that particular area had been pushed over into rubbing contact with the ram, which would not, and could not, have been the case if the gland had not been left by the mechanic on June 18 in a tilted position, so as to bring that part into such contact. The evidence of Purvis, the supervisor of all the engineer lift inspectors of the Law Accident Insurance Society, with whom the landlord was insured, makes what I have just said quite clear. As was pointed out by Thomas, the experienced engineer called for the landlord:

> . . . the highest part of the machine marks had been rubbed down and brightened but the bases of the markings were still there, for much rubbing is required to remove machine marks from cast-iron [because of its hardness].

A counter-suggestion was made in cross-examination that, if the gland had been so tilted, more signs of rubbing would have been left higher up on the gunmetal ring, in a position diagonally opposite to the bright patch near the bottom of the iron gland, than in fact remained visible, but the answers given seem to me sufficient to account for any such differences, namely, (i) that the gunmetal ring fitted the ram too closely for it to tilt much in relation to the ram, and (ii) that there were in fact some signs of rubbing apparent on it in the suggested position.

It will be convenient now to state my reasons for thinking that the tilting of the gland was the sole cause and for disagreeing with the judge's conclusion that the condition of the ram was a contributing cause of the breakdown of the gland. First, the upper and larger ram was in a much more worn condition than the lower and thinner ram, but the cylinder gland which travelled up and down it did not fracture. Secondly, the worn condition of both rams had been in existence for at least two years, not only without any accident, but without either the engineers (who inspected and adjusted every fortnight) or even the insurance company's inspectors (who inspected twice a year and were primarily concerned with safety) ever imagining that it was causing any danger. Thirdly, in 1939 the lift had been descending with vexatious slowness, and the engineers had been giving the question close attention and spending more money than they received out of their contract in experiments and work on the packing, but had never had the remotest suspicion that the condition of the rams was a cause of danger. They admitted in the box that, though they had urged the renewal of the rams, it was their purse, and not the thought of danger, which made them urge renewal. Fourthly, as late as Apr., 1940, the insurance company after inspection reported that all was well, and both their technical witnesses said in the box that there was no danger. Fifthly, it was almost common ground that the stresses which caused the stud and gland to break must have come from outside the stuffing-box and not from inside, and laterally and not vertically, the gland being designed to meet a vertical downward stress from inside, but not a lateral stress from outside.

The increase of pressure which occurred as the stuffing-box passed from a more worn part of the run to a less worn—and, therefore, thicker—part, described as the " wedge-like " effect, was exerted within the stuffing-box on the packing, and tended to make it spread, but the force so exerted only operated downwards, since, *ex hypothesi*, it could not find release either upwards through the floor of the cylinder or sideways through the circular wall of the stuffing-box. Its direction, therefore, was necessarily the normal direction in which pressure from the packing must always operate. I can see no justification for supposing that any lateral pressure on the gland resulted from that cause, such as alone could, in the opinion of the witnesses, have caused a rupture of the gland. In addition, it was generally agreed that, if the fatal pressure had come from inside the cylinder, it would have blown the packing out of the stuffing-box, whereas in fact the packing was left in position in the stuffing-box.

There was general agreement that, if the gland was put on askew and one stud left looser than the other, the rupture of the cast-iron gland would be a likely consequence, and the judge, on ample evidence, found that that is just what did happen. I am unable to follow his reasoning when he says in his judgment that the worn state of the ram threw " additional " strain on the tilted gland, or that the tilting would " increase the strain." The right inference from the evidence appears to me to be that the act of negligence on the part of the mechanic sufficed as the sole cause of the plaintiff's hurt. At the lowest, the evidence was to throw the burden of proof on the party alleging that the worn condition of the lower ram had any causal materiality, and, for reasons I have already given, I am satisfied that that burden was not discharged. However, even if, as the judge thought, the state of the ram did predispose the gland to rupture under the new strain of the tilted gland, the latter was the direct cause of the accident, and I hold accordingly.

Upon the issues of legal liability there was much controversy before us. As regards the landlord, was the plaintiff a mere licensee, or was he an invitee ? What was the landlord's duty towards him ? If he was a mere A
licensee upon the landlord's premises, did the fact that he was being carried in a moving lift impose on the landlord, as the judge thought, a higher measure of duty than that of an ordinary occupier towards a licensee ? If he was an invitee, was there an absolute duty on the landlord to provide a reasonably safe lift, or was it only a qualified duty B
to take reasonable care to provide a safe lift ? As regards the engineers, did they owe any duty to the plaintiff, or was their contractual duty to the landlord the only duty which rested upon their shoulders ? Is the principle in the case of a manufacturer enunciated in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) and applied in *Grant* v. *Australian Knitting* C
Mills, Ltd. (2) one which extends to a repairer ? If so, what are its limitations ?

It will be convenient to discuss the law affecting the landlord first. His position was the ordinary one of a landlord in a block of flats. He retained possession and control of the staircases, lifts and other common D
parts giving access to the various flats. The terms of the tenancies were not in evidence, but, if they had been, they would, in my opinion, on the above facts, have been irrelevant. The judge held that towards the landlord the plaintiff was a mere licensee, because it was on the business of a tenant that the plaintiff was upon the landlord's premises. In holding so, he E
was following what he thought had been actually decided by the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (3). Three noble and learned Lords, constituting the majority, there said in the course of their opinions that an invitee of a tenant of a flat using a part of the block of flats of which the landlord retains occupation is a mere F
licensee of the landlord. If that view was essential to the decision, of course, the judge was bound to apply the law so laid down, and so are we. If it was not, this court has the right, and also the duty, to form and express its own opinion, whilst, of course, paying the respect which is due to any considered expression of opinion in the House of Lords.
G

For reasons which I will state in a moment, I think that it is still open to this court to take that course, and, if so, it is my duty to express my view. My view is that, in the ordinary case, the landlord of a block of flats, who retains possession, occupation and control of the means of access which he provides for the use of his tenants and their visitors, has H
an interest of his own in facilitating access to the flats not only of his tenants and their households, but also of their visitors, and, therefore, that, when a visitor avails himself of the proferred access, he does so upon the implied invitation of the landlord. If so, the plaintiff was the landlord's invitee, to use a horrid, non-English word made common, if not invented, by our judges, which, however, is less misleading than the

phrase "licensee with an interest," used by some judges as a synonym for "invitee," for the latter seems to predicate an interest in the licensee rather than in the licensor, which normally cannot be relevant. I recognise that *Fairman's* case (3) is often cited as deciding that the A landlord's relationship to such a visitor is that of licensor to a mere licensee, and it is, therefore, necessary to look closely into it in order to see what was really involved in the decision. The actual *ratio decidendi* is shown most clearly by comparing the pleadings with the findings of fact by SHEARMAN, J. The plaintiff, a lodger in a tenant's flat, tripped on B a worn stair of the common staircase, through her heel catching in an iron bar at the edge of the step. The defendants in their defence denied that the step was dangerous, and alleged that its condition was well-known to the plaintiff. The judge found:

> . . . that there was no negligence on the part of the respondents; that no complaint as to the state of the staircase had been made to the respondents' caretaker C or to anybody; that at the time of the accident neither the staircase as a whole nor the particular step on which the appellant fell was dangerous; that the depression in which the appellant caught her heel was obvious to anybody walking up or down the stairs and could have been seen by the appellant if she had looked, and was consequently not in the nature of a trap or concealed danger; and on these findings he gave judgment for the respondents.

D Even if the plaintiff was an invitee and not a "mere licensee," it seems to me that, on those findings, the defendants were entitled to judgment, and it is noteworthy that LORD ATKINSON expressly said so, at p. 86:

> But even if the plaintiff was in the position of an invitee of the defendants, her rights and duties in that character would be those described and measured by the well-known passage from WILLES, J.'s, judgment, in *Indermaur* v. *Dames* (4).

E Then Lord ATKINSON quoted the first two sentences of that passage, in which WILLES, J., said, at p. 288:

> The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business F which concerns the occupier and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know . . .

In *Fairman's* case (3), LORD ATKINSON said, at p. 88:

> G Lastly the learned judge finds that no complaint was made by any of the defendants' tenants that this staircase was out of repair, nor did he think he could possibly find that the staircase as a whole or that this particular place could be described in plain English as dangerous.

Later, LORD SUMNER said, at p. 92:

> In law I think that, if the place is plainly visible, as it was, the plaintiff, being in H full possession of her faculties, was bound to look after herself, as she had always done before. If on that day she was tripping down, I do not say carelessly but free from care, and did not appreciate what was there for her to see, this cannot in itself impose liability on the occupiers or warrant a dissent from the trial judge's conclusions of fact.

Then LORD SUMNER added, at p. 92:

> In this particular case, however, it makes no difference to the liability whether she was the defendants' licensee or their invitee.

Later, LORD WRENBURY referred to the judge's findings of fact as follows, at p. 95:

> . . . (1) that there was no negligence on the part of the defendants in allowing the stairs to be in the condition in which they in fact were; (2) that beyond the fact that the plaintiff went up and down the stairs without seeing the defect, there was no negligence on her part; (3) that the staircase was not dangerous; and (4) that A the depression, owing to wear and tear, was perfectly obvious to anybody walking up or down the stairs.

Then LORD WRENBURY drew the conclusion, at p. 98, that, on those facts, the plaintiff could not recover. For these reasons, I venture to think that the legal differences between the rights of a mere licensee and those B of an invitee, or between the duties of a licensor and those of an invitor, were not in issue in that case, and that the expressions of opinion thereon were truly *obiter dicta.*

It is sometimes said that invitation cannot be inferred unless a common interest obtains between invitee and invitor, but I see no legal ground for C making community of interest an essential criterion. Possibly the idea arose from the words used by WILLES, J., in *Indermaur* v. *Dames* (4), when, referring to the facts of that case, he spoke of the plaintiff thus, at p. 285:

> . . . a person on lawful business, in the course of fulfilling a contract in which both D the plaintiff and the defendant had an interest.

I cannot see that the separate interest of the visitor necessarily affects the duty of the occupier. If the latter has any interest of a business kind in the presence on his premises of the other person, such as would naturally lead him to "invite" the visitor if he gave his mind to the question, it E is sufficient, in my opinion, to cast upon him that measure of care which the common law exacts towards an invitee. The invitation may be written or spoken, or tacit and indicated only by conduct. In my humble opinion, differing from each of the three noble and learned Lords in *Fairman's* case (3), I think that the landlord of a block of flats must F inevitably be interested in making his staircases and lifts available to persons desiring to visit his tenants, for, if he did not provide these facilities of access, he could not let his flats. Indeed, the provision of a lift is one of the "common services," as they are often called, which are essential to the successful prosecution of his business, and the word G "Lift," usually exhibited in the entrance hall, is itself an invitation from the landlord to the visitor to use the lift in order to get to the flat which he wishes to visit. For this reason, I hold that the plaintiff was an invitee of Daw when he entered the lift.

On the scope of the occupier's duty to an invitee at common law, there H is to-day general agreement, except on one aspect, and, if the plaintiff was an invitee, as I think that he was, the liability of the landlord in the present case to the plaintiff as his invitee turns on that very point. Is it his duty to provide "reasonably safe premises," or only to "take reasonable care" to ensure that his premises shall be safe? The former standard is higher than the latter, "a limited duty of insurance, as one

may call it," as was said in POLLOCK ON TORTS, 14th Edn., p. 406, and, it has been suggested, may involve responsibility for the act of an independent contractor : see WINFIELD ON TORTS, p. 581, note (*d*). There are some judicial expressions to the former effect, but I do not know of any case
A where the point has been the *ratio decidendi.* In *Indermaur* v. *Dames* (4), WILLES, J., expressed it as a duty of care only, and I cannot see how, on principle, it can be put any higher. The gist of the well-known definition of ALDERSON, B., in *Blyth* v. *Birmingham Waterworks Co.* (5) was this, at p. 784 :

> B . . . the omission to do something which a reasonable man . . . would do, or the doing something which a prudent and reasonable man would not do.

The authors of BULLEN AND LEAKE ON PLEADING, 3rd Edn., 1868, p. 368, accepted that formula as their own view. O. W. HOLMES, J., when sitting as a *puisne* judge in Massachusetts, where English law still prevailed,
C expressed the same view in *Commonwealth* v. *Pierce* (6), and that was only three years after the publication of his great book, HOLMES ON COMMON LAW. In *Commonwealth* v. *Pierce* (6), he said :

> So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he
> D can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of TINDAL, C.J., [in *Vaughan* v. *Menlove* (7), at p. 475] : "Instead therefore of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a
> E man of ordinary prudence would observe.

Lancaster Canal Co. v. *Parnaby* (8) was an action by an invitee against the canal company for damages caused by a wreck left by the company in their canal. A very strong Exchequer Chamber of seven judges, including PARKE and MAULE, BB., as well as TINDAL, C.J., who delivered
F the judgment, said this, at p. 243 :

> . . . and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the
> G breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injury.

To put on the occupier any higher measure of duty than that of care seems to me to depart from first principles. Whether, on the true
H theory of the English law of torts, the duty rests on a moral basis, or on a public policy which makes the actor take the risk of his act or omission if harm results to another, or whether those two factors have both combined in our legal history to affect the minds of the judges who have worked out our theory of responsibility for negligence to the stage of development which it has now reached, does not seem to matter in the present appeal, for, whichever be the right view to take historically, the outlook or

anticipation of the actor at the time he acts must inevitably be one vital ingredient in the estimation of his duty. I am, of course, using the words "actor" and "acts" to cover omission as well as action. If, as a reasonably prudent man, the actor ought to have foreseen probable danger from his action to a person in the position of the plaintiff, and hurt does result, then, on any of the three views, the imposition of liability is just, except in those cases where the actor is exercising a right already possessed by him. However, to put on him a so-called "strict liability" similar to the responsibility of an insurer seems to me unjust, unless there be present other circumstances which give rise to an exceptional measure of duty, or make it right that the particular action should be at the peril of the actor, as in the case of dangerous chattels, such as guns or poisons, or of animals of a savage nature, or known to the actor to be dangerous, and of acts within the rule of *Rylands* v. *Fletcher* (9). These well-established types of cases where the law imposes a "strict liability" have, nevertheless, the same underlying feature as characterises the duty of an occupier to his invitee. In all of them, the actor foresees—or, as a reasonable man, ought to foresee—danger to persons so placed as to be likely to be affected, but whom he has no right in law so to affect. They are all equally referable to the duty of care, though they call for a higher degree of care because of the greater degree of danger to others which their special circumstances make obvious to the actor. However, I can see no ground for the law turning the ordinary occupier into such an insurer. Indeed, the contractual metaphor involved in Sir Frederick Pollock's expression seems of itself to cast a doubt upon the propriety of its application to the common law duty of "diligence" where consensual contract does not enter in.

If, as I believe to be the case, there is no authority on this point binding on this court, it is unnecessary to go through the various decisions, and it is enough if I state the conclusion at which I have arrived. The invitor is bound to take that kind of care which a reasonably prudent man in his place would take, neither more nor less. The landlord of a block of flats, as occupier of the lifts, does not profess as such to be either an electrical or (as in this case) a hydraulic engineer. Having no technical skill, he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. If he did not, he would indeed be guilty of negligence. To hold him responsible for the misdeeds of his independent contractor would be to make him insure the safety of his lift. That duty can only arise out of contract, as in the case of an employer's duty towards his employed, which, in certain cases, may make him responsible for the structural fitness of the premises where they are to work. In the present case, Daw was ignorant of the mechanics of his hydraulic lifts, and it was his duty to choose a good expert, to trust him, and then to be guided by his advice. I think that he realised his duty and wholly discharged it, so far as the safety of others was concerned, for he chose a first-class firm of lift engineers and trusted them, and over a long period of years, and in connection with many lifts, he found them trustworthy. His contract with them did not include alterations or repairs, but it called for regular reports, originally in writing at each visit, and in later years orally whenever they thought such work was needed. The contract current at the time of the accident had been made by correspondence between May 27, 1935, and July 23, 1935, and was in the following terms :

> Engineers to attend once every calendar month during ordinary working hours to adjust, clean and lubricate the mechanism of the lifts.
>
> To provide the cleaning materials and necessary lubricants, also the packing materials for the glands and leathers for the control valves.
>
> To attend also at all reasonable times during normal working hours to adjust the mechanism in the case of stoppage or irregular running between the periodical visits.
>
> To furnish signed reports after each periodical visit.
>
> Rates : £10 per annum.

The printed form of engineer's report shows the course of business. It left an open space before the signature for the insertion in ink of all requisite information as to any alterations or repairs which, in the opinion of the engineers, were necessary. They had another form of contract, which did, for a higher rate of agreed remuneration, include some repairs, but the form adopted by the landlord, supplemented by the customary report after each inspection, was plainly intended to give the landlord full information about any repair or alteration needed, and not least if any possibility of danger had developed which made it unsafe to continue running the lift pending the necessary alteration or repair.

On Apr. 19, 1939, the engineers reported that " the machine was generally in good working order." On Oct. 25, 1939, the landlord wrote complaining that amongst his hydraulic lifts those " at Hornton Court East are terribly slow in descending." On Oct. 31, 1939, the engineers made certain suggestions as to cause, which are irrelevant. On Nov. 8, 1939, after making numerous tests, they wrote reporting that the slowness was due to (i) back-pressure in the exhaust pipe line, and (ii) friction of the special rubber rings which they had been using in the stuffing-boxes to prevent leakage of the water under pressure. They said :

> The rams of these hydraulic lifts are badly worn and scored. The diameter varies from place to place. Round rubber cord will hold up water on bad rams but unfortunately it wipes the grease off the steel, friction results and the lifts slow down . . . All these lifts require to be fitted with new top and bottom rams but we know that you are disinclined to face this expenditure under present conditions. We doubt if we could obtain the necessary bars and tubes. We have discussed this matter before and the better plan is to electrify the lifts which also is probably out of the question at the moment.

To this the landlord replied on Nov. 10 as follows :

> We beg to acknowledge your letter of the 8th inst. and thank you for the trouble you have taken with regard to these lifts. For some time past you have said that new rams might be needed in the near future, especially at Hornton Court, but as you say at the present time, even if we could afford to replace the rams, it is more than doubtful if you could obtain the necessary steel. If we can keep the lifts running during the war, the question of replacing them with electric push-button lifts will arise as soon as peace is declared. As a war measure we agree your suggestion as to an extra visit each month for greasing the rams is probably the best

solution; we note the extra charge will be 10*s.* per month, *i.e.*, an extra 3*s.* 4*d.* per lift per month.

Nothing further of importance was said or happened until June 18, 1940, when, at an ordinary visit for inspecting, repacking, lubricating and adjusting, the engineers' mechanic put the lower gland on improperly. On June 19, the accident happened.

Between Nov., 1939, and the accident on Apr. 29, 1940, the insurance company reported an examination by their inspectors, at which the machine was found "to be generally in good working order" with certain irrelevant exceptions.

It was urged for the plaintiff in cross-examination at the trial, and also by argument below and before us, that the engineers' letter of Nov. 18, 1939, was a warning of the existence of danger from the worn condition of the ram, but the landlord insisted in the witness-box that he read the letter as addressed solely to his complaint of the slowness of the lift and that it conveyed to him no hint of danger, and the judge believed him. Laing, the engineers' London manager for the previous 20 years, asked why they had given up the practice of sending Daw written reports after each inspection, gave in evidence a conversation in which Daw had said:

> Look here, I have so many lifts inspected by you and also by insurance companies that my files are getting really cluttered right up. I always file the report of the insurance company, so in future do not bother me with this bundle of monthly reports. If anything happens that you want to see to, or you want me to have done, give me a ring on the telephone, or call in, or write me a letter about it.

In regard to the correspondence which passed in Oct., 1939, and Nov., 1939, Laing explained that the reason why he wanted the rams renewed was that their worn condition was putting his firm to extra expense in packing, to the extent of two or three times as much as their fixed fee. In cross-examination, he admitted that, if he had thought that there was any danger in the condition, he would have reported it at once to Daw, but he said that he thought that the rams "could be kept running during the war at least". The lift surveyor of the insurance company, who was a man with immense experience, inspecting for insurers who covered liability for accidents, and who had been inspecting the lift two or three times a year for three or four years, said that, when he last inspected before the accident, in Apr., 1940, he saw no danger from the rams or cylinder, and that he would have stopped the lift if he had. This opinion was confirmed by his company in a letter after the accident, dated July 1, 1940, saying that they were unable to admit liability on behalf of their insured, Daw. It is a fact that, after the accident had happened, Laing in the witness-box did attribute the catastrophe to the worn condition of the ram, but the idea did not occur to him when carrying out his company's contract with Daw. The company evidently had a very high reputation, and had a wide practice as lift engineers, and I can see no ground whatever for doubting that the landlord took every reasonable precaution in trusting to their examining the lift with care and reporting to him if there was any indication of danger. The landlord thus duly performed his whole duty of care to the plaintiff and to other users of the lift, even if they were his invitees, by contracting with the engineers and then leaving the expert problems, of which he was ignorant, entirely to these experts, who possessed the requisite knowledge. If he did not fail in his duty to an invitee, *a fortiori* he did not fail if the plaintiff was a mere licensee.

The judge conceded that the landlord had committed no breach of duty if the plaintiff was to be regarded as a mere licensee, but he thought that, although the plaintiff entered the building as such, yet, when he entered the landlord's lift, his position changed from that of a licensee to a position equivalent in law to that of a passenger carried gratuitously in a vehicle, for he held that the lift was a carriage, there being no difference in law between horizontal and vertical transport. That view may or may not be right in law, but it places no higher duty upon the carrier who extends a gratuitous invitation than that which the occupier owes to an invitee whom he invites to enter his premises. HILBERY, J., obviously so thought, but, treating the plaintiff as if he were an invitee, he thought that he saw ground for liability in two other considerations, which perhaps he did not keep sufficiently distinct in his mind. One was that the landlord ought to have realised, from the correspondence of the autumn of 1939, that his engineers were warning him of danger. The other was that the landlord did not in fact allow himself to be guided by the engineers' advice. These considerations would together have been fatal to him if he had been really warned by his experts of the presence of danger, but the truth is that they did not warn him of any such thing, for they did not think that there was any danger. As regards the second consideration, there was no evidence of Daw's not allowing himself to be so guided in any matter which the engineers ever suggested affected any question of safety. The landlord's appeal must, therefore, in my opinion, be allowed.

I now turn to the question of the engineers' liability. Their counsel had an arduous task. He was faced with two serious obstacles in his logical ascent to safety, which had to be climbed or circumvented. He wanted to say that our law of negligence is nothing but a catalogue of particular duties, a list which is crystallised forever, and cannot be enlarged by judicial legislation, and that *M'Alister* (*or Donoghue*) v. *Stevenson* (1) did but add one more to the list, though on what principle of the common law it came to be added he did not venture to expound. He also wanted to say that *M'Alister* (*or Donoghue*) v. *Stevenson* (1) rests on no such general principle as is needed to make its decision about manufacturers extend so as to include within its ambit repairers —if that word may be used, not quite accurately perhaps, to describe the engineers in the present case—and to put on them the duty of care towards a person in the position of the plaintiff. In my opinion, counsel had no legal warrant for either proposition. Both are erroneous. The historical investigation made in HOLMES ON COMMON LAW—especially Chapter III, on negligence—was addressed to finding out the real basis of our law of torts. By it the author demonstrated the fallacy of the first of the two propositions which counsel for the engineers needed to establish, for he showed that, though the English theory of torts had grown up first through forms of action and then through particular decisions, an analysis of our year books and generally of our case law down to 1881 discloses the gradual emergence of legal principles as its basis, perhaps one may say especially so in regard to the law of negligence. By his book, he made as great a contribution to the elucidation of principle as any one man had ever made up to then, and I believe his work greatly helped the free and natural development of English common law. In *M'Alister* (*or Donoghue*) v. *Stevenson* (1), Lord Buckmaster strove to establish the second proposition of counsel for the engineers, but failed to convert the House. In the result, in my humble opinion, the three majority opinions refute both of these propositions, each of which seems to me essential to the argument presented for the engineers. In fact, they establish our law of negligence on the firm foundation of general principle. Lord Esher in *Heaven* v. *Pender* (10) had made a valiant effort to show that general principle does underlie one important section of the law of negligence, although he was not trying to formulate any complete definition of the relevant duty. His effort was treated by Cotton and Bowen, L.JJ., and has been by others since then, in a way which was logically unjust, for they interpreted him as trying to do what I do not think he ever purported to do. In *Le Lievre* v. *Gould* (11), he himself showed, as I think, that he had not intended in *Heaven* v. *Pender* (10) what he is supposed to have intended—namely, to make an exhaustive definition which would operate as a test in all cases. Some have supposed that in *Le Lievre* v. *Gould* (11) he intended to limit his previous observations in *Heaven* v. *Pender* (10) to the particular occasions of liability which he mentioned in *Le Lievre* v. *Gould* (11). This seems to me equally unfair to him in the other direction. As I read his remarks, he was only intending to give illustrations of the kind of occasion where his principle would obviously come into operation. In *M'Alister* (*or Donoghue*) v. *Stevenson* (1), Lord Atkin rescued him from undeserved obloquy, and put his pronouncement in *Heaven* v. *Pender* (10) into its true perspective, as also did Lord Macmillan, at p. 614.

After a full historical review of the authorities Lord Atkin made it clear that he arrived at his conclusion upon the duty of manufacturers by the road of first principles, although he took care to prevent misconception such as Lord Esher had encountered by pointing out the limits within which the principles he enunciated would find practical application. Thus, it follows, in my opinion, that counsel for the engineers finds himself defeated by both the obstacles which lie in the path of his necessary argument. I feel diffidence in giving expression to any comment upon *M'Alister* (*or Donoghue*) v. *Stevenson* (1), since, in my opinion, that decision is an authority directly binding upon this court in the present case. The basis of the decision was a principle which, as there enunciated, amply suffices to justify the judgment of Hilbery, J., in the present case against the engineers. Accepting the principle to the full, I content myself with a few quotations. Lord Atkin made it clear, at p. 579, that he was seeking for authority on the principles to apply to the case in hand. He said, at p. 580 :

> And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett, M.R., in *Heaven* v. *Pender* (10), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.
>
> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.

Then he brings out one, perhaps the most essential, test arising [p. 580] :

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ; and the lawyer's question, Who is my neighbour ? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

That is the same testing principle which shines out so strongly in Holmes on Common Law, Chap. III. Lord Atkin repeats it in slightly different words, at p. 585 :

> It is sometimes said that the liability in these cases depends upon an invitation by the defendant to the plaintiff to use his chattel. I do not find the decisions expressed to be based upon this ground, but rather upon the knowledge that the plaintiff in the course of the contemplated use of the chattel would use it ; and the supposed invitation appears to me to be in many cases a fiction, and merely a form of expressing the direct relation between supplier and user which gives rise to the duty to take care.

He proceeded on his search and continued his historical analysis of the cases to the end of his judgment. In the course of it, time after time he made it clear that he was engaged in extracting the true metal of principle from the ore of the particular cases which he was passing in review.

In regard to *Winterbottom* v. *Wright* (12) (important because it was the authority upon which *Earl* v. *Lubbock* (13) was decided, see *per* Collins, M.R., at p. 255), Lord Atkin, agreeing in this with Lord Buckmaster, says, at p. 589 :

> It is to be observed that no negligence apart from breach of contract was alleged —in other words no duty was alleged other than the duty arising out of the contract ; it is not stated that the defendant knew, or ought to have known, of the latent defect.

After his very full review of all the cases, and the entire concurrence in his opinion expressed by Lord Thankerton and Lord Macmillan, I conceive that it would be, not only futile, but improper, for me to re-discuss any of the cases which he reviews, for I could only do it in order to emphasise the very principle which Lord Atkin has already made clear, since it is the application of that principle which shows that A. & P. Steven, Ltd., have, by the conduct of their mechanic, committed a breach of their duty towards the plaintiff. However, I cannot refrain from noticing a curious repetition of history. The exposition of principle of Lord Atkin has met with the same unfair criticism, though less in degree, as that which the exposition of Lord Esher evoked: *per* Scrutton, L.J., in *Farr* v. *Butters Bros. & Co.* (14), at pp. 613, 614. and Professor Stallybrass in Pollock on Torts, 9th Edn., p. 459. Is it again because the critics have fallen into the same error as in the case of Lord Esher of assuming that Lord Atkin was intending to formulate a complete criterion—almost like a definition in the prolegomena to a new theory of philosophy? Does not such criticism miss the real value of attempts to get at legal principle? The common law of England has throughout its long history developed as an organic growth, at first slowly under the hampering restrictions of legal forms of process, more quickly in the time of Lord Mansfield, and in the last 100 years at an ever-increasing rate of progress, as new cases, arising under new conditions of society, of applied science, and of public opinion, have presented themselves for solution by the courts.

It is worth noticing that in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) Lord Buckmaster, at p. 577, treated the repairer as *in consimili casu* to the manufacturer. He recognised that the principle which he denied to the common law must, if it exists at all, apply to the repairer as well as to the manufacturer. The fact that he regarded that similarity as a reason for rejecting the principle does not lessen the force of the reasons for saying that, if it does apply to the one, it must also apply to the other.

The only point in the present case which was left open in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) is the criterion of remoteness, to use the only word which, for want of a better, is available. Tucker, J., discussed it fully in *Herschtal* v. *Stewart & Ardern, Ltd.* (15), and, in order not to extend this overlong judgment, I content myself with saying that I find myself in general agreement with that closely reasoned judgment, and merely add that, if ever there was a case where a repairer, when sending out for immediate use a machine in a condition made dangerous by his professional want of skill or care, could not and would not "reasonably anticipate any intermediate examination before use," it is the case of a repair to a lift which is intended to be used by a non-expert porter as soon as the repair is finished. The facts of this case, therefore, in my opinion, clearly show that A. &. P. Steven, Ltd., did owe a duty of care to any person using the lift in the ordinary way up to the time of their next examination of it, for they realised, or ought to have realised, that no effective examination was in the least likely before then.

Clauson, L.J. [read by Goddard, L.J.]: I have had the advantage of reading the judgment which Goddard, L.J., is about to deliver.

For the sake of brevity, I desire to adopt as my own his statement of the facts, and also the conclusions which he reaches as regards the failure of the plaintiff to establish a case for damages against the defendant Daw. I agree with GODDARD, L.J., that it becomes unnecessary to determine whether the plaintiff was a licensee or an invitee. In the present case, there is no information before the court as to the contractual liability, if any, as between the landlord and the tenant whom the plaintiff was visiting, to provide a lift for the tenant's visitor. I wish to reserve the question whether a breach of such contractual liability might affect the position of the landlord as between himself and the visitor.

I now turn to the question whether the plaintiff has established a cause of action for damages against the repairers, A. & P. Steven, Ltd. As I understand it, the liability of the repairers to the plaintiff is sought to be established by applying to the facts of this case the principle affirmed by the House of Lords in *M'Alister* (*or Donoghue*) v. *Stevenson* (1). That prinicple is thus stated by LORD ATKIN, at p. 599 :

> A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is to be gathered from the opinion of LORD THANKERTON, at pp. 603, 604, that, in his Lordship's opinion, the essential element in the case, which made it necessary to recognise a relationship existing as between the manufacturer and the consumer of such a character as to give rise to the duty of the former towards the latter to exercise care, was the manufacturer's own action in bringing himself into direct relationship with the injured consumer. LORD THANKERTON explains, at p. 603, that that action was to be inferred from the fact that the manufacturer, in placing his manufactured article on the market, had intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods that he had of his own accord brought himself into direct relationship with the consumer, with the result that the consumer was entitled to rely upon the exercise of diligence by the manufacturer to secure that the article should not be harmful to the consumer. It appears from the opinion of LORD MACMILLAN, at p. 619, that, in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relation to each other, reference is to be made to the standards of the reasonable man. Assuming negligence to be established those standards must be appealed to in order to ascertain whether the party attacked owed a duty, and, if so, to whom he owed it. In the case under citation, LORD MACMILLAN found the necessary relation between the defendant and the plaintiff to be established by reason of the fact that the defendant was engaged in the business of manufacturing articles for human consumption in the form in which he issued them and by reason of that fact placed himself for his own ends in a relationship with all potential consumers of the articles, and thus a duty was imposed on him to take care to avoid injuring them. For the reasons thus summarised, Lord Macmillan was of opinion that the defendant, manufacturing articles for human consumption, owed to the consumers whom he had in view a duty of care in the manufacture.

The principles to be found in the opinions of the majority of their Lordships in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) were discussed and further expounded by the Judicial Committee of the Privy Council in *Grant* v. *Australian Knitting Mills, Ltd.* (2). The judgment of their Lordships clarified the question, which was much discussed before us, as to the relationship, if any, between the manufacturer or repairer of an article, on the one hand, and the persons to whom the immediate customer of the manufacturer or repairer intends, in the way of his trade or business, to give permission to use the article, on the other. The question was not strictly relevant to the decision in *Grant's* case (2), but their Lordships deal with the point (so far as a manufacturer is concerned) when rejecting the argument placed before them by counsel that there was no half-way house between confining the application of the principle of *M'Alister* (*or Donoghue*) v. *Stevenson* (1) to cases exactly on all fours with it and extending it in such a way as to leave manufacturers liable for damages of an indefinite amount after an indefinite time to claimants indeterminate until that indefinite time arises. Their Lordships pointed out that the solution of the suggested difficulty is to be found in the application, in proper cases, not always according to strict logic, of the well-established rule that cause and effect must not be too remote.

In view of these authorities, it appears to me that it is the duty of the court to examine the facts of the case, and, if the plaintiff establishes the defendant's negligence, and also proves that the damage he has suffered has been caused by that negligence (and in the present case I am satisfied that the plaintiff has established both points), to determine whether, having regard to what has in fact occurred between the negligence so established and the casualty which was the occasion of the damage suffered, the cause and effect are too remote. In examining the matter, the court will be investigating the particular relation between the defendant and the plaintiff which gives rise to the duty which is alleged to be owed by the defendant to the plaintiff, and, in particular, whether or not that relation is too remote to give rise to the duty, and in that examination the court will be guided, as Lord Macmillan pointed out in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), at p. 619, by the standards of the reasonable man, and will not be bound, as their Lordships pointed out in *Grant's* case (2), at p. 107, by the rules of strict logic.

In the present case, the machine was not in fact in first-class condition, the ram being worn and scored, but the machine was to be repaired so as to make it safe. It was repaired, but negligently, in that a particular gland was imperfectly adjusted, with the result that, in the running of the machine, owing in part to the state of the ram and in part to the maladjustment of the gland, stresses were set up in the structure of the gland in question which in fact resulted, after the machine had been handed over to the person on whose orders it had been repaired and had been used by the latter's servants for the conveyance of passengers in the ordinary way for about a day, in the gland being fractured and the machinery giving way, with consequent injury to the plaintiff, who happened to be in the lift at the moment of the occurrence. The importance of the maladjustment, and accordingly the degree of negligence in it, is, of course, emphasised by the speed with which its effects manifested themselves in the catastrophe, but I shrink from the conclusion that the relation between the plaintiff and the defendant can be modified by a consideration of the magnitude of the negligence. The magnitude of the negligence must be irrelevant to the question of the existence of the relationship. The crucial point seems to me to be whether, in the case of repair of a machine which the man who orders the repairs is intended, in the way of his trade or business, to permit others to use without any reference to the repairer, the reasonable man would regard it as reasonably contemplated by the parties that the repairer is to remain liable, after he has delivered the machine to his immediate employer, to any one but that employer for the damage traceable to his negligence which may be occasioned, while that employer is working the machine, to such persons as the employer may happen to permit to use it. In the present case, there is no evidence, and, indeed, no suggestion, that the repairer took any action such as LORD THANKERTON found in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), at p. 603, to bring himself into direct relationship with the injured plaintiff, and no evidence that any step whatever was taken by the repairer or his employer to bring into being any relationship between the repairer and the potential users. I venture to repeat, with slight verbal alterations to suit the facts of the present case, the words of MATHEW, L.J., in *Earl* v. *Lubbock* (13), approved, as I read it, by LORD ATKIN in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), at p. 592, and by their Lordships of the Privy Council in *Grant's* case (2), at p. 107. MATHEW, L.J., said, at p. 259:

> The argument of counsel for the plaintiff was that the defendant had been negligent in the performance of the contract [*scil.* to repair the machine] with the owners of the van, and that it followed as a matter of law that anyone in their employment, or, indeed, anyone else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade.

For these reasons, I feel unable to hold that the plaintiff has established any such relationship between himself and the defendants A. & P. Steven, Ltd., as entitles him to recover damages against them in respect of his injuries, and, accordingly, in my judgment, the appeal of those defendants also should, as in the case of the defendant Daw, be allowed, and judgment should accordingly be entered for both defendants with costs.

GODDARD, L.J.: The facts which appear to me to be material in A
this case are these. (1) On June 19, 1940, the plaintiff sustained injury
by the collapse of a lift at a block of flats owned by the defendant Daw,
the lift being worked by a porter in Daw's service. The tenants of the
various flats held them from Daw. (2) The plaintiff had gone to the
flats on business which the firm of solicitors by whom he was employed B
had with one of the tenants, and not on the business of Daw. (3) The
porter invited the plaintiff to enter the lift, and accompanied him into
it and set it in motion. I use the word "invited," not as importing
any legal consequence or relation, but merely in the colloquial sense.
(4) On Mar. 31, 1940, the lift had been subjected to a periodical inspection C
by Daw's insurance company, who had reported that it had been found
to be generally in good working order. (5) The day before the accident,
work had been done upon it by A. & P. Steven, Ltd., who are competent
lift engineers, and who undertake the care and maintenance of lifts.
I shall refer hereafter in more detail to the contract under which they D
had been attending to the lift. (6) The cause of the lift falling was
the fracture of a gland. The fracture was due to two factors, each of
which contributed materially to the accident. One was that the gland,
after being repacked, had been refixed on the ram out of truth, or, as it was
described at the trial, at a tilt. The other was that the ram was worn E
and scored. Whether either of those causes without the other would
have caused the gland to fracture does not seem to have been expressly
found by the judge, but I do not think that anything turns on this. It
is enough to say that fixing the gland at a tilt on the scored ram caused
the former to break. (7) Daw did not know that the lift was in a dangerous F
condition. I understand the findings of the judge to mean that, though
Daw did not know of the danger, yet he ought to have known of it,
but, in my opinion, there was no evidence on which the judge could
find this.

The cause of the danger was such that it would not be apparent to the G
plaintiff, and the question as to whether or not Daw ought to have known
of its existence is of vital importance as regards his liability if the legal
relationship between him and the plaintiff is that of invitor and invitee.
Though I do not think that it was, I will give my reasons for saying that,
in my opinion, there was no evidence on which it could be held that H
Daw ought to have known of it. Daw adopted the usual and sensible
course of employing a firm of repute to inspect and look after the lifts
on the various premises which he owned. In the case of this particular
block of flats, the contract which he made provided that the engineers
of A. & P. Steven, Ltd., should attend each month to adjust, clean and
lubricate the mechanism, and, as they had to provide packing material,

it was obviously contemplated that any necessary repacking of the machinery should be done by them, as in fact it always was. They had also to come and adjust the mechanism at any time when stoppage or irregular running occurred. They had to furnish special reports after each periodical visit. Clearly, had any danger been apparent, it would be the duty of A. & P. Steven, Ltd., to report it, nor did they contend otherwise. The judge, however, has laid great stress on the fact that there was another class of contract which Daw could have made, under which A. & P. Steven, Ltd., would have undertaken repairs and necessary renewals, and apparently considers that, because this form was not adopted, Daw cannot be said to have put himself into the hands of A. & P. Steven, Ltd., and cannot, therefore, rely on their employment by him as discharging any duty of care. With all respect, I think that this is a false point. The alternative contract merely provides for the quantum of work which A. & P. Steven, Ltd., had to undertake in return for an increased fee. In the one case, they would report what ought to be done, and Daw would have to pay for it if he decided to have it done. In the other, A. & P. Steven, Ltd., would have to do it for their inclusive fee. The adoption of the less expensive contract in no way lessened the duty of A. & P. Steven, Ltd., to report any danger which was, or ought to have been, apparent to them as experts.

In Oct., 1939, Daw complained of the slow running of the lift, and on Nov. 8, 1939, A. &. P. Steven, Ltd., sent a long report advising that new top and bottom rams should be fitted, as the ones in use were badly worn and scored. However, it is clear that this was advised, not as a matter of safety, but (i) to correct the slow running; and (ii) because this condition made frequent repacking necessary, which was an expensive business for A. & P. Steven, Ltd. There was nothing at all to suggest to Daw that there was any element of danger in the condition of the rams, and Laing, who had charge of this work for A. & P. Steven, Ltd., has stated more than once in his evidence that he did not expect or consider that there was any danger. A. & P. Steven, Ltd., suggested, owing to wartime difficulties in getting new material for the rams, that their engineers should pay a second visit each month to grease the rams at a small extra fee, and to this Daw assented. The only possible conclusion seems to me to be that no question of safety ever arose in the mind of either A. & P. Steven, Ltd., or Daw, that the former suggested that they would keep the lift running satisfactorily and that Daw assented to it. There is also the fact that Daw's insurers had no fault to find with the lift when they made their periodical inspection on Mar. 31, and, of course, safety would be the main consideration to which they would direct their inspection. The judge has found—rightly, in my opinion—that Daw did not know that there was danger, and, in my opinion, there is nothing in the evidence to support a finding that he ought to have known that there was.

This brings us at once to the question of what duty was owed by

Daw to a person who came to the flats and used the lift for the purpose of visiting a tenant, and not on the business of the landlord. I confess that, were it not for authority which binds me, I should be strongly tempted to hold that, in the case of flats and offices, having regard to modern conditions of life and business, the plaintiff ought to be regarded as an invitee. LORD SUMNER put the matter tersely in *Mersey Docks & Harbour Board* v. *Procter* (16), at p. 272:

> The leading distinction between an invitee and licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none.

In the case of blocks of offices in the city, everyone knows that lifts are running all day, not only for the use of the tenants, but also for the use of their clients and customers. The landlord must provide facilities and conveniences to enable his tenants to carry on their business if he wants to let the offices and keep his tenants. Surely he would prejudice his prospects of letting on favourable terms a second or third floor office to a stockbroker, solicitor or merchant were he to say: "The lift is for you only. I do not undertake to allow your clients, or even your clerks, to use it. I may do so as a matter of grace, but that is all." The more convenient and attractive he can make his property for persons resorting thereto on business, the better the rent he can obtain. This applies equally to the case of residential flats, where tenants expect and require facilities for their visitors, whether on business or on social calls. If, then, it is in the landlord's interest to provide facilities for those who desire to visit his tenants, I should incline to the opinion that the relationship between landlord and visitor was that of invitor and invitee. However, unless I have wholly misunderstood *Fairman* v. *Perpetual Investment Building Society* (3), I do not think that it is open to me so to hold. That case concerned a block of flats, access to which was obtained by a staircase under the control of the owners. The person who met with an accident on the staircase was the lodger, and a sister of one of the tenants. While there was a difference of opinion as to the effect of the evidence, it seems to me that all the noble and learned Lords who gave opinions in that case thought that the plaintiff fell into the category of a licensee, and not into that of an invitee. They overruled *Miller* v. *Hancock* (17), a case which has been subject to much criticism and which, again, concerned a staircase at a block of flats. For this purpose, I can see no distinction between a staircase and a lift. They are merely alternative methods of access. Both LORD SUMNER, at p. 92, and LORD WRENBURY, at p. 95, say in terms that the plaintiff was a licensee, and not an invitee, of the landlords', and, though they said that in that particular case it made no difference whether the plaintiff was the one or the other, I cannot regard their views on this matter as being merely *obiter*. If they were, I think that it is for the House of Lords, and not for this court, to say so. Accordingly, as, *vis-a-vis* Daw, the plaintiff was merely a licensee, the only duty which the former owed was not to expose him to, or to warn him of, a danger of which he, Daw, was aware. It is, I think, generally conceded that, when in *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck* (18) LORD HAILSHAM, in stating the duty owed by a licensee, spoke, at p. 372, of a danger which was known, or ought to have been known, to an occupier, he used these latter words *per incuriam* (see *Ellis* v. *Fulham Borough Council* (19) in the King's Bench Division), as all the authorities are consistent on the point that the duty owed to a licensee is only to give warning of dangers of which the occupier actually knows. However, the judge has held that, as Daw undertook the conveyance of the plaintiff in a moving vehicle, he owed him a higher duty. That he owed him a duty to exercise care in the actual working of the lift none will deny, but did he owe a duty to a licensee to exercise care to see that a lift which he believed to be safe and had no reason to think was in any way a source of danger was in fact safe ? I cannot think so. I agree with HILBERY, J., in thinking that the matter may be tested by comparison with the ordinary case of carriage of passengers, though I disagree with his conclusion. Suppose A agrees to drive B to the station in his car for reward. A owes a duty to B to take care that the car he provides for this purpose is safe. However, if B stops A in the street and asks for a lift, A is under no duty, before acceding to his request, to take care to see that some danger of which he is not then aware is not present in the condition of his car. In my opinion, a person who asks for, and is given, a gratuitous ride in a vehicle, whether in the horizontal or in the vertical plane, takes the vehicle as he finds it, and is entitled only to warning of that danger of which the owner is aware. The judge relies expressly on *Harris* v. *Perry & Co.* (20), but, when the facts of that case are examined, I think that it is clear that the case is to be regarded as depending on an act of negligence during the transit. Of course, if I give a person a lift in my car, I must drive with due care, but that is very different from being under a duty to use care to see that the car is in a safe condition before I let him get in, when I have no reason to believe that it is not. The exact point arose in *Moffatt* v. *Bateman* (21), where the plaintiff accepted a ride in a carriage the kingpin of which broke, and the defendant was held not to be liable for the injuries which the plaintiff sustained. I may also refer to *Coughlin* v. *Gillison* (22), and, by way of contrast, to *Hyman* v. *Nye* (23), where an accident occurred to a carriage which had been hired by the plaintiff from the defendant for reward. A bolt broke, and the defendant was held liable, it being his duty to supply a carriage as fit for the purpose as skill and care could render it. In my opinion, therefore, as the plaintiff *vis-a-vis* Daw was only a licensee, he cannot recover.

However, even assuming that the plaintiff is to be regarded as an invitee, I think that his claim against Daw must fail. Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe. I need not quote the classic passage from the judgment of Willes, J., in *Indermaur* v. *Dames* (4), but he there points out that whether or not reasonable care has been taken is to be determined as a matter of fact. It seems to me that, by employing a first-class firm of lift engineers to make periodical inspections of the lift, adjust it and furnish reports upon it, this defendant did all that a reasonable man could do towards seeing that the lift was safe, especially when it is remembered that he also had the advantage of quarterly inspections by the insurance company's engineer. However, it is said that, if the engineers were negligent, it cannot be said that the occupier has discharged his duty. With this I cannot agree. An occupier or any other person may have, either by contract or by law, such a degree of duty imposed upon him that he cannot discharge it by employing a contractor to do work for him, but, where the duty is to take care that the premises are safe, I cannot see how it can be discharged better than by the employment of competent contractors. Indeed, one may well ask how otherwise could the duty be discharged ? This was the opinion of Horridge, J., in *Morgan* v. *Girls Friendly Society* (*Incorporated Central Council*) (24), and I agree with it. It may well be that, if the duty arises out of contract, a higher degree is required. It may be, for instance, that, as between landlord and tenant, as a result of contract, the former agrees to supply a lift as safe as skill and care can make it, as in *Hyman* v. *Nye* (23). "Contractual obligations, of course, stand apart," said Hamilton, L.J., in *Latham* v. *Johnson* (*R.*) *& Nephew, Ltd.* (25), at p. 410, and the subject was dealt with at length by McCardie, J., in *Maclenan* v. *Segar* (26), at p. 330. However, where the duty is not contractual, but is that which the law attaches to an invitor, I am satisfied that, in such a case as the present, he can discharge it by employing a competent expert. Indeed, I do not think that Hilbery, J., would have decided otherwise had he not taken the view which he did about the contract between Daw and A. & P. Steven, Ltd., and had it not been for the fact that he thought that Daw ought to have appreciated that the lift was in an unsafe condition. I need not state again my reasons for disagreeing with him on these two matters.

I now turn to the question of the liability of A. & P. Steven, Ltd., which depends, I think, entirely on whether the principle of *M'Alister* (*or Donoghue*) v. *Stevenson* (1) applies to the case of a repairer as it does to a manufacturer of chattels, when, from the nature of the case, it appears that there is no reasonable opportunity for the examination of the chattel after the repair is complete and before it is used, and when the use by persons other than the person with whom the repairer contracted must be contemplated or expected. The plaintiff contends that it does, and that this view has been taken on more than one occasion by courts of first instance. A. & P. Steven, Ltd., contend that it is the principle of *Earl* v. *Lubbock* (13) which governs this case, and that *M'Alister* (*or Donoghue*) v. *Stevenson* (1) expressly recognises the correctness of that decision. I believe that this is the first time that the question has come before an appellate court, and, accordingly, one must examine with care the principle on which *M'Alister* (*or Donoghue*) v. *Stevenson* (1) depends. It is to be observed that the two noble and learned Lords who formed the minority in that case thought that the decision must necessarily apply to a repairer. I think that one may say that this A appears to have been one of the reasons for their dissent. LORD BUCKMASTER said, at p. 577 :

> The principle contended for must be this : that the manufacturer, *or indeed the repairer* of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed.

B The italics are mine. LORD TOMLIN expressed the same view, at p. 599. Taken alone, the sentence states the proposition too widely, for it omits the all-important qualification that the liability is said to exist only where there is no reasonable opportunity for inspection of the chattel between its leaving the hands of the manufacturer or repairer C and its consumption or use. I pause here for a moment to say that I think that it is generally considered that, when LORD ATKIN used the expression "reasonable possibility" with relation to inspection, he meant possibility in a commercial sense, and, as I ventured to say in *Paine* v. *Colne Valley Electricity Supply Co., Ltd., and British Insulated* D *Cables, Ltd.* (27), the word "probability" might perhaps be used instead. One should, I think, ask oneself the question : "In the circumstances of any particular case, ought the purchaser, or, in the case of repairs, the person for whom the repairs were done, to have made inspection for himself ?" Apart from the question whether *Earl* v. *Lubbock* (13) E is still good law, the contention of these defendants, as I understand it, is that the true principle underlying *M'Alister* (*or Donoghue*) v. *Stevenson* (1) is that it was to the interest of the manufacturer that his goods should reach the consumer unopened, and that it was his intention that they should, and that this was the reason for privity or proximity F or direct relationship, call it what you will, being established between the manufacturer and the ultimate consumer. On the other hand, it is said that the governing factor is the possibility or probability or contemplation that an inspection will take place before the goods are put into use. For my part, I think that the latter proposition is the truth, G and for this conclusion I find support in the advice of the Judicial Committee in *Grant* v. *Australian Knitting Mills, Ltd.* (2). The *corpus delicti* in that case was a pair of underpants. Had they been washed before use, no ill effects would have resulted. I cannot see that it matters one iota to a manufacturer whether a purchaser washes them before use or H not, from the point of view of his interest in the sale. I can well understand, however, that a canner of food or a manufacturer of mineral water has an interest in his products not being opened by anyone but the consumer, as the product would otherwise be injured. Equally I have no doubt that some rather particular people would have new underclothes washed before using them. However, in *Grant's* case (2), LORD WRIGHT disposed of the matter in a sentence, at p. 105 ;

> It was not contemplated that they should be first washed.

If, then, there was any doubt about the governing principle of *M'Alister (or Donoghue)* v. *Stevenson* (1), Lord Wright has dissipated it. The manufacturer was held liable, not because he was interested in his product being used as it left his factory, but because he had no reason A to contemplate an examination by the retailer or ultimate buyer before use. Believing, as I do, that this is the governing principle, it follows that, in my opinion, *Dransfield* v. *British Insulated Cables, Ltd.* (28) was wrongly decided, though I do not propose to burden this judgment with a discussion of that case. On what sound principle, then, can B the case of a repairer be distinguished from that of a maker of an article ? Of course, the doctrine does not apply to the repair of any article any more than to its manufacture. If I order my tailor to make me a suit, or a watchmaker to repair my watch, no one would suppose that anyone but myself was going to use the suit or watch. If the tailor left a large C needle in the lining, and it injured a person to whom at some time I lent the coat, I should think that the latter could not recover against the tailor. The relationship would be altogether too remote, and many of the suggested difficulties of *M'Alister (or Donoghue)* v. *Stevenson* (1) disappear if it is realised that the decision was, as I venture to believe, D essentially one on the question of remoteness. The case of a lift repairer, however, is very different. A lift in a block of flats is there to be used by the owner and his servants, the tenants and their servants, and all persons resorting thereto on lawful business. Blocks of flats and offices are frequently owned by limited companies, who would be E contracting parties with the lift engineers. In such a case, the employer would be the one " person " who could by no possibility use the lift. If the repairers do their work carelessly or fail to report a danger of which, as experts, they ought to be aware, I cannot see why the principle of *M'Alister (or Donoghue)* v. *Stevenson* (1) should not apply to them. F However, it is said that *Earl* v. *Lubbock* (13) is a direct authority for the proposition that, in such a case, no duty is owed by the repairer to anyone except the person with whom they made the contract, and that the decision is expressly approved in *M'Alister (or Donoghue)* v. *Stevenson* (1). In my opinion, however, this is not so. I think that both Lord G Atkin and Lord Macmillan dealt with that case as showing that, where the duty the breach of which is alleged arises solely out of contract, the duty cannot be owed to anyone who was not a party to the contract. Lord Atkin started his consideration of the case by saying, at p. 592 :

> Collins, M.R., said the case was concluded by *Winterbottom* v. *Wright* H (12). In other words, he must have treated the duty as alleged to arise only from a breach of contract; for, as has been pointed out, that was the only allegation in *Winterbottom* v. *Wright* (12), negligence apart from contract being neither averred nor proved.

Again, when Lord Atkin expresses his approval of the judgment of Mathew, L.J., he is, as I understand his opinion, again confining his approval to that aspect. Lord Macmillan speaking of *Earl* v. *Lubbock*

(13), says in terms, at p. 615, that the case turns upon the rule that a stranger to a contract cannot found an action of tort on a breach of that contract. It is perfectly true that both *Winterbottom* v. *Wright* (12) and *Earl* v. *Lubbock* (13) were presented as actions arising out of tort, and not as breaches of contract, but the duty in both cases was alleged to arise solely out of contract, and in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) the whole case for the respondents was that, as there was no contractual relation between pursuer and defender, the latter owed no duty to the former. They sought to limit the exceptions to that rule to cases of things dangerous in themselves and to cases where there was an element of fraud. It is surely because the House rejected that argument and enlarged the conception of duty that the decision is now regarded as a leading case in our law. BRANSON, J., in *Stennett* v. *Hancock & Peters* (29) and ATKINSON, J., in *Buckner* v. *Ashby & Horner, Ltd.* (30) both took the view of *Earl* v. *Lubbock* (13) which I have endeavoured to express, and I agree with the latter that, if properly pleaded, that case would be differently decided to-day. It follows that, where the facts show that no intermediate inspection is practicable or is contemplated, a repairer of a chattel stands in no different position from that of a manufacturer, and does owe a duty to a person who, in the ordinary course, may be expected to make use of the thing repaired. It is said, however, that it is not right that a repairer who, as in the present case, has stipulated with the person who employs him that he shall not be liable for accidents should none the less be made liable to a third person. The answer to this argument is that the duty to the third party arises not out of the contract, but independently of it. It is, for instance, a common thing nowadays for a garage proprietor to stipulate that customers' cars are driven by him only at the sole risk of the customer. If, however, while driving a customer's car, the garage proprietor runs into and injures a pedestrian, the contract he has made affords no answer to the latter's claim. To hold the repairer liable in the circumstances of the present case in no way enlarges the liability of a contractor or repairer who, being employed to do certain work, does it properly and hands it over to the person who employed him. If a danger be thereby created, it is for the employer to guard against it. For instance, an owner of property engages a contractor to erect an obstruction across a drive or private road where none has before existed. He does what he is employed to do exactly in the way his employer desires. Next day a tradesman approaching the house in the dark runs into the unexpected obstruction and is injured. He has no claim against the contractor, because it is the employer who created the danger, and on whom lies the duty of guarding or warning against it. To render the contractor or repairer liable, there must be (i) a want of care on his part in the performance of the work he was employed to do, and (ii) circumstances which show that the employer will be left in ignorance of the danger which the lack of care has created. Suppose a lift repairer told the owner that a part was worn out, so that, while he could patch it up, he could not leave it in a safe condition. If he were told to do the best he could, and an accident then happened, I cannot conceive that the repairer would be held liable. He has fulfilled his duty by warning the employer, and, if the latter, in spite of that, chooses to allow the lift to be used, the liability rests on him. The accident would be caused, not by the carelessness of the repairer, but by the employer's disregard of the warning given to him. In the present case, Daw is not liable to the plaintiff, because he had a right to rely on the work and reports of the experts he employed, and no examination of their work after completion was contemplated. It would, I venture to think, be a strange and unjust result if the plaintiff, who has been injured directly by the careless performance of the work, is to be left without a remedy. In my opinion, the appeal of A. & P. Steven, Ltd., should be dismissed.

Appeal of Daw allowed with costs and appeal of A. & P. Steven, Ltd., dismissed with costs. Costs of the defendant Daw in the court below to be paid direct to him by A. & P. Steven, Ltd. Leave to appeal to the House of Lords.

Solicitors: *Carpenters* (for the appellants in the first appeal); *Kenneth Brown, Baker, Baker* (for the appellant in the second appeal); *Simmons & Simmons* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re ROBB'S CONTRACT.

[Court of Appeal (Lord Greene, M.R., Clauson and du Parcq, L.JJ.), **July 22, 23, 29, 31, 1941.**]

Revenue—Stamp duty—Voluntary conveyance—Conveyance to trustees for sale—Necessity for adjudication—Finance (1909-10) *Act*, 1910 (*c.* 8), *s.* 74.

The purchaser claimed that a certain instrument, dated Mar. 31, 1932, which formed part of the title deeds, should be adjudicated and stamped accordingly. The deed in question was a conveyance to trustees on trust for sale, the proceeds of which were to be held upon the trusts declared in a deed of settlement of even date to be executed immediately after the conveyance. The vendor contended that the instrument was one under which no beneficial interest passed within the meaning of the Finance (1909-10) Act, 1910, s. 74 (6), and that it did not, therefore, need an adjudication stamp:—

Held: (i) the document in question was one under which no beneficial interest in the property conveyed or transferred passed.

(ii) all that is done by sect. 74 (6) is to exclude the documents there specified from the charge to duty. Sect. 74 (2), however, requires every document which falls within the definition of a " voluntary disposition *inter vivos* " to be adjudicated. Therefore, the document in question required to be stamped with an adjudication stamp.

Decision of Simonds, J. ([1941] 2 All E.R. 200) *affirmed.*

[**EDITORIAL NOTE.** Clauson, L.J., states in this case that he has, with much reluctance, been compelled by the inexorable logic of Lord Greene, M.R., to concur in the judgment given herein. Logic, whether of the inexorable or some milder kind, has not always been the guiding star of legal decision in our courts. Even after the courts had cast aside forms of action as the test of legal rights and based themselves on principle, they were always inclined to reject metaphysical distinctions in favour of reasonableness as expounded by the man on the Clapham omnibus. The construction of statutes perhaps lends itself to logical treatment more than other matters falling to be decided in the courts, but, even here, strict logic has always been controlled by arguments addressed to the inconvenience of a particular construction, especially where such construction would be contrary to the views upon which the business world and conveyancers had long acted in settling their affairs and, more particularly, the title to property. In the present case, it was shown that the construction which has been adopted was not only contrary to the practice of the business world and conveyancers, but also to that of the Inland Revenue Commissioners. Despite this, however, the Court of Appeal has found it impossible to adopt any other view than that every conveyance or transfer operating as a voluntary disposition *inter vivos* must be brought in for adjudication. This, of course, means that any document operating to transfer or convey any property not being made for a consideration equal to the full market value of the property must be adjudicated, and includes such documents as an appointment of a new trustee (provided the implied vesting declaration is allowed to operate) and even an assent (whether under seal or under hand) by a personal representative. There are few titles which do not include an instrument of this nature, and the result is that the great majority of titles to unregistered land will be subject to this stamp objection, which, by reason of the Stamp Act, 1891, s. 117, cannot be waived. In the world of business the inconvenience is more considerable, since it has long been the common practice to execute a transfer for a nominal consideration for the purpose of securing the repayment of a loan. To bring in every such transfer for adjudication will place an almost intolerable burden upon both the business community and the adjudication department. These matters, however, were brought fully to the notice of the court, but the language of the subsection was too plain to give any effect to them. One thing which does not appear to have brought to the notice of the court is that the stamping of the particular document here in question would seem to be governed by the Stamp Act, 1891, s. 106, in conjunction with sect. 11, and it would appear that the proper stamping of the document is a 10*s.* stamp and a duty paid denoting stamp. Though that might be an answer in the case of the particular document in question, it would be no answer in the majority of cases. It is felt, however, that the argument of the court that the construction of the section adopted is necessary for the protection of the revenue is based on a misconception of the present position with regard to stamping documents. There was a time when compulsory adjudication would have been necessary to afford such protection, but the practice of the Stamp Duty Office now is to inspect every document presented for stamping and to settle for itself what duty is attracted by the document. The practical difficulties resulting from this decision would appear to be such that the only proper course is to pass amending legislation.

As to Stamps on Voluntary Dispositions *inter vivos*, see HALSBURY, Hailsham Edn., Vol. 28, pp. 475-477, paras. 1004-1007 ; and for Cases, see DIGEST, Vol.39, pp. 284, 285, Nos. 667-671.]

Cases referred to :

(1) *Re Soden & Alexander's Contract*, [1918] 2 Ch. 258 ; 40 Digest 163, *1321* ; 87 L.J.Ch. 529 ; 119 L.T. 516.

(2) *Conybear* v. *British Briquettes, Ltd.*, [1937] 4 All E.R. 191 ; Digest Supp.
(3) *Baker* v. *Inland Revenue Comrs.*, [1924] A.C. 270 ; 39 Digest 285, *670* ; 93 L.J.K.B. 211 ; 130 L.T. 513.

Appeal by the respondents Robb, Sutherland and Taylor, from an order of Simmonds, J., dated May 7, 1941 and reported [1941] 2 All E.R. 200, where the facts are fully set out.

J. Neville Gray, K.C., and *G. D. Johnston* for the appellants.

J. Norman Daynes, K.C., and *C. A. J. Bonner* for the respondents.

Gray, K.C. : The question in the present case arises under the Finance (1909-10) Act, 1910, s. 76, and it relates to the wording of sub-sect. (2). The purchasers say that the conveyance on trust for sale must be adjudicated under sub-sect. (2). In respect of most of the five classes of exceptions in sub-sect. (6), it is perfectly obvious whether or not a document is a voluntary conveyance. It is a question whether the words " no conveyance or transfer " mean no voluntary conveyance or no conveyance upon which the commissioners have been required to express an opinion. By sub-sect. (5), if the consideration is inadequate, the disposition is to be treated as voluntary unless it is proved that a conveyance was a conveyance on sale. There must be thousands of conveyances which have not been adjudicated. The purchaser contends that a beneficial interest passes under the deed in the present case, because the trustees are to hold, not only the proceeds of sale, but also the rents and profits of any property while unsold, and it is said that that gives a beneficial interest. The answer is that the trustees hold the rents and profits upon trust in the same way as they would hold the proceeds of sale. In subsect. (2), the word " may " means " may." It does not mean " must." In Williams on Vendor and Purchaser, 14th Edn., p. 298, the author is dealing with a case in which there might well be a beneficial interest passing. It is quite clear upon the face of the document in the present case that no beneficial interest passes. *Conybear* v. *British Briquettes, Ltd.* (2) is to be distinguished. The view is put by Bennett, J., that the legislature is imposing compulsory adjudication. Bennett, J., did not mean that. If he did, he was wrong. He was saying that the document in the case before him could have been submitted under sect. 74 (2), and that it would have been the right course to submit it. The words of subsect. (5) are very wide. The only purpose of the section was to charge with duty voluntary dispositions *inter vivos* under which a beneficial interest passes.

Daynes, K.C. : No authority has been cited for the appellants to show that the documents should not be adjudicated. It would have been simple to have had it adjudicated, and it is difficult to see why that was not done. In *Baker* v. *Inland Revenue Comrs.* (3), the question was raised as to whether or not a resettlement of land was within sect. 74, and the decision was against the subject. It has been recognised for a long time, in the case of a transfer of a mortgage on the appointment of new trustees, that the only prudent course is to have the transfer adjudicated. Subsect. (6) is simply a direction to the commissioners, and the cases excepted by that subsection are not taken out of subsect. (2). The document in the present case does not come within the exceptions in subsect. (6), and, therefore, it is subject to *ad valorem* duty under subsect. (1), quite apart from adjudication under sub-sect. (2). It would be unfair, in the instances mentioned in subsect. (6), to charge *ad valorem* duty in the case of those transactions. There is no unfairness, however, in requiring adjudication. The subject is given the right to ask for adjudication. If he does not ask, the document will not be properly stamped in cases where an adjudication stamp is required in addition to the *ad valorem* stamp. In *Conybear* v. *British Briquettes, Ltd.* (2), Bennett, J., took the view that subsect (2) applied whether or not a document came within subsect. (6). Three judges in the court below have taken the view that subsect. (2) applies to a case which is within subsect. (6)—namely, Younger, J., in *Re Soden & Alexander's Contract* (1), Bennett, J., in *Conybear* v. *British Briquettes, Ltd.* (2), and Simonds, J., in the present case. *Prima facie*, the stamp duty on the conveyance in the present case is insufficient, because it ought, *prima facie*, to bear an *ad valorem* stamp. One would expect an *ad valorem* stamp to be upon the conveyance itself, because, when one looks at it, one sees that various provisions are made which deal with the beneficial interest.

Bonner, following on the same side : On the facts of the present case the document is a transfer or conveyance which, by sect. 74 (2), is not to be deemed to be duly stamped unless it has been submitted for adjudication and the commissioners have adjudicated upon it. Subsect. (5) operates as a definition of what is meant in sect. 74 by a voluntary disposition *inter vivos*. The principal words of this subsection are "shall not for this purpose." It is the duty of the commissioners to consider whether the consideration is adequate, and, if they come to the conclusion that it is not, they may form an opinion accordingly, and may subject the document to a further element of stamp duty. The words "for this purpose" mean for the purpose of limiting the exception which is continued in the first bracketed words in subsect. (5). In the present case, the document is comprised within subsect. (2), and, as it has not been submitted for adjudication, it must be deemed not to have been properly stamped.

Gray, K.C., in reply.

Lord Greene, M.R. : This appeal raises a troublesome question as to the true construction of the Finance (1909-10) Act, 1910, s. 74. The question which falls for decision is, put shortly, whether or not a particular document which forms part of the vendor's title ought to bear an adjudication stamp. The purchaser objects that the document is not properly stamped unless it bears such a stamp. The document in question is a conveyance of land on trust for sale, and, in order to get rid of one or two preliminary points with regard to it, I wish to say that, in my opinion, that document is a document under which no beneficial interest passes in the property conveyed or transferred. That is the language of sect. 74 (6) of the Act, and, in the hearing before Simonds, J., and in the hearing before us, the point was taken that A this document did not fall under that description. I need add nothing to the judgment of Simonds, J., upon that point, with which I am in entire agreement.

Sect. 74 is the section which imposes *ad valorem* stamp duty on conveyances or transfers operating as voluntary dispositions. The section B begins by directing that any such conveyance or transfer is to be :

> . . . chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale . . .

The expression " conveyance or transfer operating as a voluntary disposition " is defined in subsect. (5), which is in effect a definition clause : C

> Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*.

Pausing there for a moment, the effect of that definition is to sweep D within its net every conveyance or transfer which does not fall within the excluding words as a " disposition made in favour of a purchaser or incumbrancer," etc. The effect of that definition clause is, down to this point, that the document in question is, for the purposes of the section, to be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*. Subsect. (5) continues as follows : E

> . . . and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstance the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred. F

That is contemplating the expression of an opinion by the commissioners in order to ensure that conveyances for inadequate consideration do not slip through the net. I may say in passing, with regard to the words " shall not for this purpose be deemed," to which some argument was addressed, that, in my judgment, the words " this purpose " refer to G the definition in the earlier part of the subsection which I have read. In other words, that branch of the subsection is, so to speak, as subidiary definition clause, which is defining, for the purpose of the first part of the subsection, the meaning of " valuable consideration."

Turning back, therefore, to the effect of sect. 74 (1), we find that this H conveyance is to be chargeable :

> . . . with the like stamp duty as if it were a conveyance or transfer on sale . . .

When I come to subsect. (6), it will be found that that liability to charge is taken away by that subsection. Subsect. (2) is in the following terms :

> Notwithstanding anything in sect. 12 of the principal Act [the Stamp Act, 1891] the commissioners may be required to express their opinion under that section

> on any conveyance or transfer operating as a voluntary disposition *inter vivos*, and no such conveyance or transfer shall be deemed to be duly stamped unless the commissioners have expressed their opinion thereon in accordance with that section.

It seems to be clear that the words " no such conveyance or transfer shall be deemed to be duly stamped " are to be construed as referring to the words " conveyance or transfer operating as a voluntary disposition *inter vivos*," and cannot be confined to such documents of that description as have been submitted to the commissioners for adjudication. In other words, the subsection is requiring every document which falls within the definition of a " conveyance or transfer operating as a voluntary disposition " to be taken in to the commissioners for the purpose of adjudication in accordance with the Stamp Act, 1891, s. 12. That section gives the commissioners power to express their opinion with reference to any executed instrument upon two questions—namely, (i) whether it is chargeable with any duty, and (ii) with what amount of duty it is chargeable—and the incorporation into sect. 74 (2) of that machinery makes it clear that one of the questions which the commissioners may have to decide will be whether the document tendered for their opinion is chargeable with any duty at all. The subsection, therefore, on the face of it, appears to me to contemplate quite clearly that among the documents which fall to be submitted to the commissioners under the subsection there will be documents which are not chargeable with any duty, and the question whether or not they are chargeable with duty will be determined by the commissioners when they adjudicate under the powers of sect. 12. Pausing there again, the language of subsect. (2), combined with the other provisions, so far as I have read them, appears to me to prescribe, without any room for doubt, that every conveyance or transfer which falls within the definition of " a voluntary disposition *inter vivos* " must bear an adjudication stamp, and, if it does not, it is not to be deemed to be duly stamped. Therefore, the document in question is not to be deemed to be duly stamped unless it bears an adjudication stamp. As a pure matter of construction, I can see no escape from that conclusion, so far as I have gone in examining the section. The object of compelling the submission to the commissioners of every voluntary disposition is, from the revenue point of view, quite clear. The legislature obviously was anxious that the authorities should have the opportunity of scrutinising every voluntary disposition, or every document purporting to be a voluntary disposition, in order to see whether it is a voluntary disposition, whether or not the consideration is adequate, and whether or not, under some form of camouflage, an instrument is escaping the burden of the stamp law. There seems to me to be a very good reason in policy why that should be done, speaking again quite generally, with regard to instruments operating as voluntary dispositions.

I should say at this stage that the view that subsect. (2) imposes a general obligation in respect of such documents to have the adjudication stamp impressed upon them is one which has been taken in two previous cases, which I need not examine in detail. One is a decision of Younger, J., in *Re Soden & Alexander's Contract* (1), and the other is a decision of Bennett, J., in *Conybear* v. *British Briquettes, Ltd.* (2).

I now come to the only real argument of substance which it is necessary to consider, and that is an argument based on subsect. (6). It was obviously realised by the legislature that there were certain classes of document as to which it would be unjust to exact *ad valorem* stamp duty, and accordingly in subsect. (6) provision is made exempting documents of those classes from the charge. I must read the whole subsection in order to make the point clear :

> A conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan, or made for effectuating the appointment of a new trustee or the retirement of a trustee, whether the trust is expressed or implied, or under which no beneficial interest passes in the property conveyed or transferred, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, shall not be charged with duty under this section, and this subsection shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer.

It is argued that the effect of that subsection is to remove from the ambit of the charge all documents of the description there set forth, and, further, to exempt such documents from the provisions of subsect. (2), which require an adjudication stamp. That argument has this attractiveness about it. If it were correct, it would avoid very serious inconveniences in the conduct of business affairs. I have been impressed throughout the argument of this case with the inconveniences which must flow from the decision which, in my opinion, is the right one. However, although it is always right to give full weight to arguments based on considerations of this kind, it is not permissible for the mind to be so affected by the inconveniences which would follow as to lead to a forced construction of words which have a clear meaning in the ordinary use of language. In this case, I find myself unable to construe the provision in question in such a way as to avoid those inconveniences without doing to the language of the section a violence which is not justified.

The argument is of this nature. It is said that, as the object of the section is to impose a charge to stamp duty, and as subsect. (6) removes from the scope of the charge the documents there described, the effect is that subsect. (1) must be read as though it had said : " Any conveyance or transfer operating as a voluntary disposition *inter vivos*, other than those mentioned in subsect. (6) of this section, shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale . . ." That, I think, is the most compendious form of putting the first step in the argument. Then it is said that, as these documents are taken out of the ambit of the charge, there can be no reason for construing the section in such a way as to leave them within the provisions of subsect.

(2). If, it is said, these documents are exempted from duty, what point can there be in compelling all those exempted documents to be brought in to the commissioners for the purpose of adjudication ? Also, emphasis as I have said, is quite rightly laid on the great inconvenience which would be caused by taking that view. In effect, what the argument really amounts to is that subsect. (6) should be construed as though it had provided that the section was not to apply to documents of this character. Had it said that, of course, there could have been no doubt about the matter, because the effect would have been that those documents would not merely have been taken out of the charge imposed by subsect. (1), but would unquestionably have been taken out of the provisions of subsect. (2). However, the difficulty is that subsect. (6) does not say so. When the legislature wished to exclude a particular form of document from the whole of the provisions of the section, it did so in the clearest possible language. It did so in the proviso to subsect. (1), which enacts that the section is not to apply to a conveyance or transfer operating as a voluntary disposition of property to a specified class of incorporated body. That would have been the way in which the application of the whole section is limited so as to exclude from all its provisions a particular class of document. All that is done by the language of subsect. (6) is to exclude the documents therein specified from the charge to duty. Charge to duty, however, is not the only thing which the section enacts. It not only enacts the charge to duty under subsect. (1), but, under subsect. (2), as I have already pointed out, requires every document which falls within the definition of a " voluntary disposition *inter vivos* " to be brought for the adjudication of the commissioners in order to see whether or not it is chargeable with duty. I cannot regard that provision as a mere piece of machinery which necessarily ceases to be applicable once a particular document is excluded from the charge under subsect. (1). It seems to me that there is a quite independent reason for the existence of that piece of machinery, and I have already mentioned it. There is nothing unreasonable in the legislature saying that certain classes of documents shall not be subject to charge but that, nevertheless, they are to be produced to the commissioners in order that they may see whether or not they are exempt. Accordingly, I am unable to construe the words " shall not be chargeable to duty under this section " which appear in subsect. (6) as though they amounted to an entire exclusion of the documents there mentioned from the whole operation of the section. It seems to me quite impossible to take that view on any proper principle of construction.

That really disposes of the matter, but I cannot leave this case without saying one further word on the matter of inconvenience. The inconvenience of this result, from the point of view of business with bankers and so forth, under which transfers for nominal consideration for the purpose of securing an advance are made, is obvious to anyone familiar with what goes on in business in Great Britain. Indeed, the inconvenience has impressed itself upon the Inland Revenue Commissioners, who have issued a circular, to which we were referred, which endeavours to deal with that inconvenience. The circular, in so far as the directions therein contained are inconsistent with the decision which this court reaches upon this question, is one which has no support in law, however much, as a matter of practical administration of the Act, the commissioners may desire to waive the strict provisions of the Act. The existence of that circular is a thing which this court cannot allow to affect its mind in deciding what is the true construction of the section. All that it does is to emphasise in a very striking way the great inconvenience of the section when construed as I consider that it should be construed, and the matter may well be one for the attention of the legislature, in order to remedy that inconvenience. However, we cannot be affected by it. All we can do is to construe the Act. In the result, I find myself in entire agreement with the conclusion of Simonds, J., and the appeal must be dismissed with costs.

Clauson, L.J.: With much reluctance, I find myself compelled by the inexorable logic of Lord Greene, M.R., to concur in the judgment which he has just given. I will not conceal the fact that I have made the most strenuous efforts to see whether, consistently with the canons of construction by which this court is bound, a different result could be achieved, because I am conscious of the great inconvenience which this decision will probably cause. If it were a question of two competing constructions of really ambiguous words, no doubt one would be justifiably swayed in deciding in favour of one construction or the other by a consideration of the results which would follow and by a consideration of what the legislature is likely to have meant, but, where the words, as I am afraid they do in this case, lead to one result, and can lead to one result only, such considerations as I have mentioned must be put aside.

I desire, however, to make one or two more observations. I cannot myself think that, when the legislature adopted this unfortunately phrased subsect. (6), they can have realised what a serious burden was being placed upon the public. As Lord Greene, M.R., has pointed out, the fact that that burden is serious is shown by the fact that the Inland Revenue Commissioners issued, many years ago, a circular which will be found in Sargeant on Stamp Duties, p. 51, and in which, assuming —as, of course, I do assume— that our construction of the section is correct, they are deliberately inviting persons whose duty it is to act upon properly stamped documents only to disregard the provisions of the section. I mention that for the moment only as showing how great the inconvenience must be found to have been. I cannot think that the commissioners would have issued a circular when they knew it was inviting persons to take an illegal course, and for a long time I tried to persuade myself that it was possible so to construe the section as to treat that circular as inviting persons concerned to take a course which would be legal. Unfortunately, the commissioners are not represented here. His Majesty's Treasury, who are often responsible in these matters, are not represented here, and it may be that, if they were represented here, it would be possible to resolve the difficulty and come to a conclusion which might reconcile the true construction of the section with that circular.

I wish to make an observation about one particular point, which I confess did not occur to me in the course of the argument. A good deal was made of the inconvenience arising from the section if it does involve an adjudication of every transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan. I think I do see a possible loophole there. It will be observed that a conveyance or transfer which is not a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration is to be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, but it occurs to me that it may be—it is not necessary to decide it, and I do not propose to say anything which can be treated as a decision—that a transfer made for nominal consideration in favour of a person who has advanced money may come within the words of exception as being a disposition made in favour of an incumbrancer in good faith and for valuable consideration, and may therefore not come within the definition of this section "a conveyance or transfer operating as a voluntary disposition *inter vivos*," and that might justify the attitude of the Inland Revenue Commissioners in not insisting on the adjudication of such a transfer of shares. I find in the circular, however, that persons who have to register transfers are invited not to require adjudication of, *inter alia*, transfers vesting property in trustees on the appointment of a new trustee of a pre-existing trust or on the retirement of a trustee, and I cannot, for myself, find anything in the section which would fail to bring such a document within the words "a transfer for effecting the appointment of a new trustee." Accordingly, I can see at present, for myself, no possible legal justification for the Inland Revenue Commissioners inviting responsible officers to act upon such documents though they are not adjudicated.

As I have said, I appreciate the burden, but I doubt whether, in passing this subsection, the legislature really appreciated the burden being laid on the public, a burden the magnitude of which is shown by the fact that it was thought necessary to issue the circular to which I have referred. I have hesitated long before accepting a construction of the section which must involve that the Inland Revenue Commissioners have either misconstrued the section or thought it within their duty to authorise persons to disregard the operation of the section. However, the result is that I have used every endeavour to see if I could suggest any answer to the inexorable logic to which I have already referred, but I have failed to find an answer, and, therefore, I find myself in agreement with the judgment of Lord Greene, M.R., that the section must be construed as he has stated and that this appeal must be dismissed.

du Parcq, L.J. : I also agree with the judgment of Lord Greene, M.R., for the reasons he has given, and there is nothing which I can usefully add.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors : *Fladgate & Co.* (for the appellants) ; *Evill & Coleman* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re SAMUEL, JACOBS *v.* RAMSDEN.

[Court of Appeal (Lord Greene, M.R., Clauson and du Parcq, L.JJ.), **July 29, 30, 31, August 1, 1941.**]

Wills—Conditions—Forfeiture—Uncertainty—"Marriage with a person who is not of Jewish parentage and of the Jewish faith."

The testator by cl. 8 of his will inserted a condition subsequent whereby his children would forfeit their interests under his will if they married "a person who is not of Jewish parentage and of the Jewish faith." One of the testator's daughters married a man who, it was admitted, was neither of Jewish parentage nor of the Jewish faith. It was contended on behalf of the respondents that the terms "of Jewish parentage" and "of the Jewish faith" were both so vague that the condition was void for uncertainty :—

Held : (i) the context of the will showed that by the words "of Jewish parentage" the testator was referring to religion, and that he intended both parents of the husband whom his daughter should marry to be of the Jewish faith at the time of that husband's birth.

(ii) in the context of the testator's will, the words "of the Jewish faith" were not too vague to be considered, and the forfeiture clause was valid.

Per cur. Where the language is certain, the mere difficulty of proving facts is not in itself sufficient to render a clause of this kind too vague. In a forfeiture clause, the burden of establishing the forfeiture rests on those who allege that it has taken place, and, if the facts as to the religion of the parent of the husband are impossible to ascertain, all that that means is that the forfeiture cannot be established. It may very well be that a woman confronted with a clause of this kind and unable to ascertain facts with regard to the parents of her intended husband may have to take a chance. That does not mean that the phrase is too vague.

Re Blaiberg, Blaiberg and Public Trustee v. *De Andia Yrarrzaval and Blaiberg* (10) *overruled.*

Decision of Bennett, J. ([1941] 1 All E.R. 539) *reversed.*

[**EDITORIAL NOTE.** This is a welcome decision, so far as it goes, for the validity of many wills, drafted in reliance upon the older authorities here considered, was rendered doubtful by the decisions in *Re Blaiberg* (10) and in this case in the court below. The principle underlying the cases has difficulties of its own and, as the cases stand, it seems practically impossible to solve the difficulty in any particular case (unless the words of the condition here used have been exactly followed)without taking the opinion of the court. The principle is that, if the language of the condition is clear, it is immaterial that there will be a difficulty in proving the facts which determine whether the condition has come into effect. This seems to have been stated, though not, perhaps, in the clearest terms, by Fry, J., in *Re Exmouth* (1883) 23 Ch.D. 158 ; 44 Digest 441, *2668*. Those words were explained by Russell, J., in *Re Lanyon*, [1927] 2 Ch. 264 ; 44 Digest 456, *2782*, and the principle was again stated, very much in the same terms as Lord Greene, M.R., has used herein, by Lord Romer in *Sifton* v. *Sifton* (1) at pp. 442, 443. Though the principle thus stated seems clear enough, its practical application is subject to this difficulty. If we take the case of a condition that a person shall be of the Jewish faith, then one person may say that he finds a difficulty in defining the meaning of the words "of the Jewish faith," in which case the condition is uncertain and void, while another may say that he understands perfectly what those words mean, but he would find it extremely difficult to say whether it was proved that any particular person held the Jewish faith, in which case the condition is certain and valid. That this is a very real difficulty is shown by the fact that the decisions in the lower court were founded on the decision in *Sifton* v. *Sifton* (1), whilst the statement of the law adopted by Lord Greene, M.R., and printed in a slightly shortened form at the end of the headnote above, might have been taken from the same case at pp. 442, 443. The solution of the difficulty is to be found no doubt in the words of Lord Greene, M.R., that, "in practice, these questions must be approached with a certain measure of common sense."

As to Conditions of Forfeiture, see HALSBURY, Hailsham Edn., Vol. 34, pp. 105-109, paras. 141-143 ; and for Cases, see DIGEST, Vol. 44, p. 462, No. 2825.]

Cases referred to :

(1) *Sifton* v. *Sifton*, [1938] A.C. 656 ; [1938] 3 All E.R. 435 ; Digest Supp. ; 107 L.J.P.C. 97 ; 159 L.T. 289.

(2) *Clavering* v. *Ellison* (1859), 7 H.L.Cas. 707 ; 44 Digest 440, *2667* ; 29 L.J.Ch. 761 ; *affg.* (1857), 8 De G.M. & G. 662 ; *affg.* (1856), 3 Drew. 451.

(3) *Hodgson* v. *Halford* (1879), 11 Ch.D. 959 ; 44 Digest 452, *2748* ; 48 L.J.Ch. 548.

(4) *In the Goods of Knox* (1889), 23 L.R.Ir. 542 ; 44 Digest 457, case *2786 vii.*

(5) *Re Joseph, Pain* v. *Joseph*, [1908] 2 Ch. 507 ; 44 Digest 1225, *10601* ; 77 L.J.Ch. 832 ; 99 L.T. 539 ; *revsg.*, [1908] 1 Ch. 599.

(6) *Patton* v. *Toronto General Trusts Corpn.*, [1930] A.C. 629 ; Digest Supp. ; 143 L.T. 572 ; *sub nom. Re Patton, Patton* v. *Toronto General Trusts Corpn.*, 99 L.J.P.C. 213.

(7) *Re May, Eggar* v. *May*, [1932] 1 Ch. 99 ; Digest Supp. ; 101 L.J.Ch. 12 ; 146 L.T. 56.

(8) *Re Borwick, Borwick* v. *Borwick*, [1933] Ch. 657 ; Digest Supp. ; 102 L.J.Ch. 199 ; 149 L.T. 116.

(9) *Re Tegg, Public Trustee* v. *Bryant*, [1936] 2 All E.R. 878 ; Digest Supp.

(10) *Re Blaiberg, Blaiberg and Public Trustee* v. *De Andia Yrarrzaval and Blaiberg*, [1940] 1 Ch. 385 ; [1940] 1 All E.R. 632 ; Digest Supp. ; 109 L.J.Ch. 166 ; 162 L.T. 418.

(11) *Re Evans, Hewitt* v. *Edwards*, [1940] Ch. 629 ; Digest Supp. ; 109 L.J.Ch. 216 ; 162 L.T. 420.

(12) *Perrin* v. *Lyon, Lyon* v. *Geddes* (1807), 9 East, 170 ; 44 Digest 456, *2778*.

(13) *Re Mylne, Potter* v. *Dow*, [1941] 1 All E.R. 405 ; Digest Supp.

Appeal by the plaintiffs from an order of Bennett, J., dated May 22

1941, and reported [1941] 1 All E.R. 539. The facts are fully set out in the judgment of LORD GREENE, M.R.

R. F. Roxburgh, K.C., and *H. O. Danckwerts* for the appellants, the trustees of the will.

H. B. Vaisey, K.C., and *E. M. Winterbotham* for the first and second respondents, a daughter of the testator and her husband.

C. V. Rawlence for the third respondent, the trustee of a deed of settlement.

J. Neville Gray, K.C., and *P. B. Morle* for the remaining respondents, other parties interested under the will.

Roxburgh, K.C.: Criminal courts have often had to answer the question to be decided here in cases arising under the Factories Acts and the Shop Acts. The attention of the judge, however, was not called to any of the cases. The words "Jewish race" have been used in statutes on many occasions, and have always been construed as a reference to religion. The words "of Jewish parentage" mean that the person referred to had a father and mother who were Jews at the time of the birth of the person concerned. The phrase occurs in the statute 1 Anne, c. 30, and there is no doubt, by reason of the context, that the phrase means Jews by religion. The phrase "Jewish parentage" does not often occur in statutes, and it does not appear to be in any reported case. The phrase "Scottish parentage," however, occurs in *Perrin* v. *Lyon* (12), and in that case nobody submitted that the clause was void for uncertainty. The point in that case was as to whether or not the clause was void as being against public policy. The words "Jewish faith" and "Jewish religion" have often occurred. They have been challenged hitherto, however, not on the ground of uncertainty, but on the ground that they were in restraint of marriage. In *Sifton* v. *Sifton* (1), the words were "continue to reside in Canada," and they were held to be too vague. The difficulty in the present case has arisen from the decision in *Blaiberg's* case (10). In that case, FARWELL, J., said that the phrase "professing the Jewish religion" was void for uncertainty. Later, MORTON, J., had to consider a codicil to the same will in which the words were "not of the Jewish faith," and he held that, if the phrase "professing the Jewish faith" was void for uncertainty, the phrase "of the Jewish faith" was *a fortiori* void. In *Patton* v. *Toronto General Trusts Corpn.* (6), the words were "proved himself to be of the Lutheran religion." That was held to be a valid provision, and it does not seem to have been suggested by anyone that there was any difficulty in a man's proving himself to be of the Lutheran religion. [Counsel referred to *In the Goods of Knox* (4), *Re Evans, Hewitt* v. *Edwards* (11), *Re Mylne, Potter* v. *Dow* (13), *Hodgson* v. *Halford* (3) and *Re Joseph, Pain* v. *Joseph* (5).]

Vaisey, K.C.: Both branches of the prohibition are so vague, both in their general meaning and in their application to particular cases, that they do not possess the measure of certainty necessary in a forfeiture clause. The clause limits the number of people from among whom a person may choose a husband. The effect of it is to make the bulk of the community persons within the prohibition. If the words "Jewish parentage" refer to race, the parents must be lifelong Jews. If the words refer to religion, the question arises as to what sort of religion must be predicated of the parents, and whether or not it must be predicated of both parents. Also, the question arises as to the date at which it must be so predicated. There is great difficulty in distinguishing a Jew racially. Parentage is a matter of stock, and not of religion. The words "Jewish parentage" refer to race. It is a matter of great difficulty to ascertain the boundaries of religion. The clause in question is a forfeiture clause, and, therefore, its terms must be certain. Mrs. Clayton did not know before her marriage to what extent her husband had to be a believing or a conforming Jew. All she knew was that he had to be of Jewish parentage. A far greater and higher degree of certainty is required in a forfeiture clause than is to be found in the words in question. Mrs. Clayton is entitled to the benefit of the principle, laid down by a long line of cases, that, before any events happen, she should be able to ascertain what she may do, and also form a view as to the things she may not do. [Counsel referred to *Re Blaiberg, Blaiberg and Public Trustee* v. *De Andia Yrarrzaval and Blaiberg* (10) and *Clavering* v. *Ellison* (2).]

Winterbotham, following on the same side: The words in question are uncertain because they are capable of more than one meaning. They are too uncertain to determine what the testator meant. The *prima facie* meaning of the word "Jew" is to denote race. The words "of Jewish parentage" may mean that one parent is a Jew or that both parents are Jews. A gift is void for uncertainty whenever there is an ambiguity which cannot be resolved. [Counsel referred to *Clavering* v. *Ellison* (2), *Re Tegg, Public Trustee* v. *Bryant* (9), *Sifton* v. *Sifton* (1), *Re Borwick, Borwick* v. *Borwick* (8), *Patton* v. *Toronto General Trusts Corpn.* (6) and *Hodgson* v. *Halford* (3).]

LORD GREENE, M.R. [delivering the judgment of the court]: The testator in this case did what many testators do, or attempt to do—namely, direct the lives of his children from the grave. Such a thing is distasteful to many people, and I can well understand the desire of a court to escape from such a result if the language used and the law applicable so permit. In the present case, BENNETT, J., held that the provision in question in the testator's will was void for uncertainty, and that, accordingly, the forfeiture clause did not operate. That clause was expressed in the following terms, so far as material to this judgment:

> Notwithstanding anything hereinbefore contained I declare that if my said son Ivor Dudley Samuel or my said daughter Edna Samuel shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith then as from the date of such marriage all the trusts powers and provisions in this my will contained and at that date subsisting and capable of taking

> effect thereafter in favour of (*a*) my said son or daughter (as the case may be) contracting such marriage or (*b*) the person with whom he or she shall contract such marriage or any subsequent marriage or (*c*) any child or children thereafter to be born of him or her or (*d*) the issue of any such last-mentioned child or children shall cease and determine and be no longer exercisable . . .

The rest I need not read. The principles upon which forfeiture clauses are to be constructed are well-known, and I need not repeat them. It is manifest that, if a testator uses words which are insufficient to describe the conception in his mind with such distinctness as to enable practical action to be based upon them, the words must be too vague to be enforced. Words, for instance, which import conceptions involving degree or relativity may well be too vague, such as " large " or " small " or " tall." One very good example is to be found in *Sifton* v. *Sifton* (1), to which I shall refer later. There the important word was " residence." Residence in some contexts may be a word to which a sufficiently precise content can be given, but in other contexts there may be no possibility of defining the content of the word in such a way as to enable anyone to act upon it. Such was the case in *Sifton* v. *Sifton* (1). An example of another context in which the word " residence " has been found to be sufficiently precise is, of course, the context in the Income Tax Acts, where residence in certain cases is of importance.

In the present case, there are two questions which fall to be considered in discussing the construction of the clause. The first question is what is meant by the words " Jewish parentage." The judge dealt with that question in this way. He referred to *Sifton* v. *Sifton* (1), a decision of the Privy Council, and, upon the basis of that decision, he arrived at the following conclusion, at p. 543 :

> In this will, there is not a trace of any indication which I can see as to the sense in which this testator used the words " of Jewish parentage." There is nothing to indicate whether he had used them with reference to the race of the parents or whether he had used them with reference to their religion. The conclusion at which I have arrived in regard to that condition is, founding myself upon the authority of LORD ROMER in *Sifton* v. *Sifton* (1), that the condition is void for uncertainty.

That reasoning, of course, cannot stand if, as a matter of construction, it is possible to resolve the ambiguity which the judge found to exist. He thought that the language used left it uncertain whether the testator in that phrase was referring to race or to religion. The first task in approaching those words is, of course, to construe them in their context, and I find myself able to do this without any real difficulty. It appears to me that they refer to religion, and not to race. I will give in a moment the reasons which I have for holding that opinion. Before us, the first argument based on that language was different from that which the judge appears to have adopted. It was contended that the words were capable of construction, and that they referred to race, and not to religion. It may very well be that, if, on the true construction of the words, they did refer to race, they might be too vague. I do not express any opinion one way or the other upon that question. It might be said that, in the absence of any definition of the percentage of Hebrew blood which the testator required, it would be impossible to determine whether or not a given person fell within the language used. I express no opinion as to whether such an argument would be right or wrong. It is highly undesirable that I should do so. I merely intimate that the point would clearly have been one proper for argument. In my opinion, however, the context here points rather to the fact that the testator was thinking, not of race, but of religion. It is obvious, from the requirements which he lays down for the husband himself, that it is religion of which he is thinking, and it is the Jewish religion into which he wishes his daughter to marry. That, I think, gives a clue to his intention when he goes back a generation and deals with the parents of the proposed husband. It is reasonably clear that a testator actuated by motives of that kind would not wish his daughter to marry a mere proselyte, who perhaps for the very purpose of satisfying the condition had gone through the ceremony of being admitted to the Jewish faith. In order to avoid such a result, he lays down a further condition, the effect of which in popular language is to ensure that the husband shall not merely belong to the Jewish faith at the date of the marriage but shall have been born into it by reason of the fact that his parents were of that faith. I think that the argument is strengthened when it is remembered that the testator must have known that the question of what is meant by "Jewish race" is one of the greatest difficulty, and one which in practice must necessarily involve all sorts of questions and leave all sorts of matters in doubt. That, I think, is a legitimate consideration to bear in mind in selecting from the language of the testator the construction which he intended, because it must not be assumed that the testator was doing something of the difficulties of which he was ignorant. There are two other matters with regard to the expression "Jewish parentage." The first is whether it refers to both parents or only to one, and the second is to what point of time it refers. With regard to both those questions, I feel no doubt. It seems to me that the ordinary meaning of the language in a context of this kind is that it refers to both parents, and refers to the time when they became parents—that is to say, to the birth of the husband. I find no difficulty about that, and it seems to me that, on that construction, the testator was laying down a good working test to enable him to achieve the result which he obviously intended. No test, of course, can be watertight, and it might be that a husband who satisfied this condition would not have been the sort of husband whom the testator wished for his daughter. In practice, however, one would have thought that this was as good a working test as any in order to ensure that the husband of his daughter—namely, the daughter with whom we are concerned—should be so confirmed in the Jewish faith as to be not merely himself a member of it but born of parents who likewise held it. That, therefore, is the construction of this language which I consider is the right one, and the result of that decision is that the reasoning of the judge upon this part of the case cannot stand.

On the footing that the words " of Jewish parentage " bear the meaning which I attribute to them, two arguments were addressed to us. First of all, it was said that there is an insuperable difficulty in ascertaining the necessary facts with regard to the parents of the husband. It was said that many Jews, both now and in earlier times, have moved about the world, that their parentage may often be unknown, that the religious beliefs of their parents may also be unknown, and that it may be impossible to establish the facts. It is to be noticed that that has really nothing to do with the question of uncertainty, because we are proceeding upon the footing that the language is certain. The argument is really directed, not to uncertainty, but to difficulties of proving facts, and, in my opinion, the mere difficulty of proving facts is not of itself sufficient to render a clause of this kind too vague. Moreover, in a forfeiture clause of this kind, the burden of establishing the forfeiture rests on those who allege that it has taken place, and, if the facts as to the religion of the parents of the husband are impossible to ascertain, all that that means is that the forfeiture cannot be established. It may very well be, of course, that a woman confronted with a clause of this kind and unable to ascertain facts with regard to the parents of her intended husband may have to take a chance. That does not mean, however, that the phrase is too vague. It means that in a particular case the facts which will or will not bring the forfeiture clause into operation are difficult of ascertainment. In practice, I cannot help thinking that these questions must be approached with a certain measure of common sense. In the case of a Jew, I should have thought that it ought not to be difficult to ascertain the religion of his parents.

The next argument was directed to the alleged vagueness of the expression " of the Jewish faith," and that argument, of course, applies both to the case of the parents and to that of the husband, once the reference to the parents is construed in the way in which I have construed it. It is said that the phrase " of the Jewish faith " leaves it uncertain what tenets of that faith must be held, what degree of observance is required, and what degree of fervour in the holding of beliefs is necessary, to enable a husband to satisfy the condition. In my judgment, an expression of this kind in such a context as this is not to be construed by reference to sectarian disputes or theological arguments, or to degrees of zeal in performance of religious duties or attendance at religious ceremonies. A much more practical test appears to me to be required. *Prima facie*, I should have thought without hesitation that the question falls to be answered out of the mouth of the person in question. Religious faith is a matter so serious that it is to be assumed that, in the normal case, a person who is asked whether or not he is a Jew by religion, or whether he belongs to any other religion, will give a perfectly conscientious answer. Counsel for the first and second respondents drew an alarming picture of this lady surrounded, like Penelope, by a crowd of suitors but condemned to perpetual spinsterhood because she would be unable to know whether or not marriage with any one of them would enable her to enjoy the advantages of a romantic union without forfeiting the solid benefits of a settled income. I should have thought that the lady, in such a situation, could resolve the question very simply by asking the gentleman of her choice whether or not he was of the Jewish faith, and, if he answered "Yes," I should have thought that, *prima facie*, that was enough. At any rate, of one thing I feel certain—namely, that the correctness or otherwise of his confession of faith would not fall to be ascertained by calling in a rabbi to cross-examine him with regard to the tenets of the faith with a view to finding out whether he was an orthodox Jew, a reformed Jew or a liberal Jew, or by inquiring into the precise degree of conviction or fervour with which he held certain specified tenets of the Jewish faith, or the frequency or sincerity of his observance of religious ceremonial or religious occasions. To find out whether or not a person who was born a Jew and alleged that he was a Jew had in point of fact repudiated his religion would be a matter which could be established by evidence without much difficulty, but, if a man, when asked a serious question of that kind, whether in the drawing-room or in the witness-box, answered, "I am a Jew by faith," that, I should have thought, was the most cogent evidence that it was to that religion that his adherence was devoted, be it zealous or lukewarm, be it wide enough to cover every strict and orthodox tenet of the faith or of a looser or more easy-going description. So far as the husband is concerned, I do not see any real difficulty about the matter. Whether or not he belongs to the Jewish faith in the sense which I have indicated is a question of fact, and, if it were disputed that he did belong to the Jewish faith, and if a person claiming under the forfeiture clause were minded to assert and endeavour to prove that he did not belong to the Jewish faith, the question would have to be resolved by evidence, and, in that event, as I have said, the man's *bona fide* and sincere assertion that that was the faith to which he adhered would be of the utmost weight. As I have indicated, he might be cross-examined and be shown to have repudiated that faith, and in that case the court would not believe what he had said. So much with regard to the position of the husband. With regard to the position of his parents, precisely the same principles, in my opinion, apply. It may or may not be more difficult in the case of the parents to ascertain whether or not, at the date of the birth of the son (the husband), they adhered to the Jewish faith. If they are alive, the difficulty, I apprehend, will be non-existent. They may be dead. If they are dead, the question of fact will fall to be proved in precisely the same manner as any other question of fact, and, when the court has before it any available evidence as to their upbringing and their religious observances, it should have no difficulty in answering the question. I repeat that mere difficulty in ascertaining facts does not mean that the language into which those facts have to be fitted is too uncertain to be enforced.

I should mention here a distinction which it was attempted to make between the words "faith" and "religion" in a clause of this kind. It was said that "faith" involves and means, and means only, the spiritual convictions of the person in question. "Religion," on the other hand, it is said, imports, not merely that, but also the element of ceremonial A observance. It is to be noticed that on that argument a condition which used the word "religion" should be more vague than one which used the word "faith," because in each case the question of spiritual conviction and belief would fall to be considered, and, in the case of religion, the additional element of ceremonial observance would fall to B be considered. I make that observation in view of the fact that in some of the reported cases the word "religion" has appeared, and, upon that argument, those cases were decided on a completely wrong view of the principles applicable to matters of this kind. In my judgment, there is no difference in such a context as this between the word "faith" and C the word "religion." When testators frame clauses of this kind, they are not concerned with distinctions of that description. They intend the clause to be a practical working affair, and one to be construed without reference to the more subtle, and no doubt more accurate, conceptions of theologians. D

Those are the conclusions to which I have come independently of authority in construing this clause. I now proceed to consider, quite briefly, certain of the authorities dealing with this class of subject-matter. By way of preface, it is right to point out that, so far as can be ascertained from any of the cases which have been cited to us, it was E not until 1940 that any doubt was ever thrown, either by the Bench or by the bar in argument, on the validity of provisions of this kind on the ground of uncertainty. Attacks have been made upon them on the ground that they were said to be against public policy, but of an attack on the ground of uncertainty no trace is discoverable before 1940. F The first case to which I wish to refer is *Clavering* v. *Ellison* (2). That was a case of a gift of residue to the testator's children to be paid as they should attain the age of 21 years, with a condition in these words:

> Provided . . . that the devises hereinbefore contained to the children of my said son are made upon this express condition, that [they] be educated in England and in G the Protestant religion according to the rites of the Church of England and in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England, then I do hereby revoke . . .

Then there was a gift over. The particular expression in that clause to which I wish to direct attention is the expression "educated . . . in the Protestant religion according to the rites of the Church of England." H I need not refer to the facts of the case, but there are two passages in the opinions delivered which have, I think, a distinct bearing upon the matters which we are now discussing. Lord Campbell, L.C., clearly as a matter of decision, and not as a mere matter of *dictum*, said, at p. 723:

> We have now only to consider whether there has been a forfeiture by a breach

> of the second condition, that the children should be educated in the Protestant religion according to the rites of the Church of England, as to which I have never entertained the smallest doubt. It has been argued as if the condition required the children to be taken regularly to a place of public worship, where Divine service should be celebrated, by a priest in orders, according to the Book of Common Prayer, and where they might hear the Athanasian Creed said or sung on all the Sundays and Saints days appointed by the Rubrick for that purpose. I find no language in the will upon which such a construction can be put, and I conceive the true meaning of the condition to be, only, that the children should be brought up as Protestants in communion with the Church of England. This they might have been had they remained in England, although, on account of sickness or distance from any place of public worship, they might very rarely have had the advantage of the ministrations of a regularly ordained clergyman, and although the service from the Liturgy might have been read by a female.

It seems to me that LORD CAMPBELL, L.C., there, in construing the phrase which he had before him, was repudiating the idea that it was to be construed in anything but a commonsense and practical way, and that questions of degree of observance or things of that kind were not matters which really fell to be considered. The argument in the present case based on the word "religion" would have been a most important argument to advance in that case, if it had been sound, but there is no trace of a suggestion that the meaning of the phrase "Protestant religion" as applied to the education of children was a matter upon which any doubt could be felt. LORD CRANWORTH said, at pp. 726, 727:

> With regard to their being educated in the Protestant religion, I quite agree with my noble and learned friend, that the burthen of proof is on the other side to show that they were not educated in the Protestant religion. But it appears to me that they were educated in the Protestant religion, so far as it was possible that they should be so educated. There is no reason to suppose that any of them were other than Protestants up to the time when they attained 21. After that, one of the young ladies, having married a Roman Catholic, abjured the Protestant religion and became a Roman Catholic; but that does not show that she was not educated in the Protestant religion. There is evidence that one of them was confirmed at St. George's. As to all of them, Protestant services were performed so far as it was possible that they should be performed; and as to the two young ladies particularly, the evidence goes to show that they were rather regular attendants at church while living in the north of England. And for all intents and purposes, if the burthen of proof had been upon them to show that they were educated in the Protestant religion, I am inclined to think that the affirmative is made out. That the negative, namely, that they were not educated in the Protestant religion, is not made out, appears to me abundantly clear.

The next case in order of date is *Hodgson* v. *Halford* (3), decided by HALL, V.-C., in 1879. In that case, the testatrix, in exercising a power of appointment by her will, declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund.

The argument there directed against the validity of that provision was based entirely on the view that it was contrary to public policy. There was no suggestion made that the difficulty of ascertaining whether a person was born a Jew, whether he had forsaken the Jewish religion, or whether he professed the Jewish religion, was so great as to make the clause inoperative, or that those phrases were so vague in their content, and expressed a conception so completely uncertain, as to make the whole clause void. It is noticeable that, although Hall, V.-C., does not deal with the question of uncertainty (which, as I have said, was never suggested before him), in relation to the argument based on public policy he says, at pp. 966, 967 :

> I cannot in the absence of authority say that a parent or appointor (and for this purpose I see no difference between them) disposing by will either of his own property or any property over which he has the power of appointment is not perfectly justified in making a provision in favour of such of his children as shall not embrace a particular faith—Christian, Roman Catholic, Mohammedan, or any other.

I do not think it possible that, if any doubt had been felt by Hall, V.-C., or felt in the profession at that time, Hall, V.-C., could have used language like that with regard to such a well-known type of provision as this.

The next case to which I would like to refer is *In the Goods of Knox* (4), a decision of the Court of Appeal in Ireland. There the condition was that, if the testator's son should marry, he should :

> . . . marry a Protestant wife, the daughter of Protestant parents, and who have always been Protestants.

If that question had fallen to be decided by reference to the matters which I have already mentioned—namely, the particular tenets believed in, the particular degree of fervour or zeal or the particular amount of attendance at religious ceremonies and observances, and so forth—the decision could not have been what it was. There again, however, nothing of the kind was ever suggested, nor was it suggested for one moment that there was any vagueness or uncertainty about it. In the judgment of the Court of Appeal in Ireland, the following passage is valuable as showing what was commonly found in wills at that date. It is true that the reference is to Ireland, but it is also well-known that provisions of this kind have been made by testators in England as well for many years. The judgment of the court was delivered by Naish, L.J., and he said, at p. 544 :

> That being so, it appears to me that there is nothing in the remaining questions to cause any difficulty. Conditions of this kind, requiring a legatee or devisee to marry persons of a particular religious denomination, and forfeiting their interest if they did not, have been repeatedly held valid, and it is now too late to question their validity.

That is not a decision on the question of uncertainty (which was never argued before the court), but it does show what the practice was and the way in which unsuccessful attacks on the ground of public policy had been made to upset it.

The next case is *Re Joseph, Pain* v. *Joseph* (5). That was a case in which this court, for a different reason, reversed the decision of Eve, J., and the matter to which I wish to call attention can be seen by looking only at the report of the hearing before that judge. There it was a gift to grandchildren, and there was this condition :

> . . . if any child or grandchild, or issue of such grandchild, should marry a person

> not professing the Jewish faith, such child, grandchild, or other issue should, for the purpose of this my will, be deemed to have died in my lifetime under 21 and unmarried.

I refer to the case, not because there is anything in the judgment which bears on this question, but to show that there again there was no
A suggestion anywhere that the reference to the Jewish faith imported any element of uncertainty. It was said that the reason for that was that the phrase there used was not the phrase which we have here, "of the Jewish faith," but the phrase "professing the Jewish faith," and it was said that the word "professing" introduces an element of certainty
B and refers to some outward manifestation which can be easily tested. It seems to me that that is much too subtle a distinction, and I notice, for what it is worth, that, in the report of the argument of counsel on each side—and they were counsel of great eminence—the language they used, at any rate as reported, in referring to the clause did not use the
C word "professing" at all. The argument of *P. O. Lawrence* in the court of first instance was this, at p. 601:

> First, the forfeiture clause at the end of the will prohibiting marriage with any person not of the Jewish faith does not apply to the substituted settled legacy.

Then *Jessel* said, at p. 602:

> D This settled legacy of £1,500 comes within the general declaration at the end of the will as to forfeiture on marriage out of the Jewish faith.

One must not lay too much stress on the report of an argument, and it is conceivable that counsel there did carefully use the word "professing" in order to show that they were conscious of the fact that that
E was the vital word in the expression, which saved it from failure for uncertainty. I prefer to take the view that it never occurred to them, whether the word was "professing" or whether the word was "of" the Jewish faith, to doubt the validity of such a clause.

Next comes a case in the Privy Council, *Patton* v. *Toronto General Trusts*
F *Corpn.* (6). There the words used with regard to the person in question were these, at p. 631:

> Provided my son Robert George Patton now residing at Cologne Germany is and remains up to the date of his death a British subject, and is and proves himself to be of the Lutheran religion, to pay to my said son, Robert George Patton, annually for and during the term of his natural life [the annuity there stated].

G Then there are certain other provisions in which the same phrase is used. Upon the argument which has been addressed to us, it would be impossible for anyone to prove himself to be of the Lutheran religion, because the inquiry into a man's religion involves an investigation of matters of degree and so forth which cannot lead to any clear result,
H and the use of such a phrase as "of the Lutheran religion" ought to be held to be too vague to be enforced. It is to be noted, however, that there is not a suggestion, from the beginning of that case to the end, of any possible doubt as to the validity of such a provision upon any such ground. The matters which were discussed were totally different.

I now come to *Re May, Eggar* v. *May* (7). That was a case which had a rather curious history, because the operation of the clause had come before Neville, J., many years before, and he had held that, in view of the infancy of the person in question, the clause could not operate, because an infant could not (putting it quite broadly) make the necessary choice of his religion. Later on, however, when the infant had become of age, the question as to the operation of the clause fell for decision. The clause there was as follows:

> Provided he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of 12 calendar months after my death until he shall after my death become a Roman Catholic [with a gift over on the happening of any of the aforesaid events or of his death, whichever should first happen].

In order to ascertain whether a person is a Roman Catholic within the meaning of that proviso, evidence would be required, and evidence was duly given. However, the idea that the language used did not express a conception sufficiently clear and precise to enable the court to enforce it never entered anybody's head from the beginning of the case to the end. It is worth looking at the evidence, which is referred to at p. 102:

> The evidence showed that Michael May had all his life been a Roman Catholic, and that his father, who was Roman Catholic, had caused him to be brought up in that faith. Michael May in his affidavit stated that to the best of his belief he had been baptised by a Roman Catholic priest; also that he had been confirmed by the Roman Catholic Bishop of Southwark, and that he had been educated at a Roman Catholic preparatory school and later on at the Roman Catholic public school, Downside. He further stated: "I am and have been all my life a Roman Catholic."

Then he claimed that the income still went to him for quite different reasons. It is noticeable that in the course of his judgment Lord Hanworth, M.R., although, of course, he was not dealing with the question of uncertainty, used language which showed the sort of sense in which he regarded phrases of that kind. For instance, he said, at p. 112:

> The accumulations were to continue and an opportunity was to be given to the young man, at such an age as the responsibility falls upon him and not upon others, of determining whether or not his adherence was definite and sure to the Roman Catholic Church.

Then again he said, at p. 113:

> It is said that he did not become a Roman Catholic, but in accordance with the terms of the will and in accordance with the decision of Neville, J., he has become a Roman Catholic, because he became that when the responsibility for his adherence to the church fell upon his shoulders and he became, in that sense, a Roman Catholic "after my death or until he shall become a Roman Catholic."

I cannot bring myself to believe that, if the argument that such a provision was void for uncertainty had appeared possible in that case, it would not have been advanced. Reliance was then placed by the respondents on a decision of Bennett, J., in 1933 in *Re Borwick, Borwick* v. *Borwick* (8). In that case, there was a condition subsequent contained in a settlement providing that an interest which would otherwise have become vested in a grandchild of the settlor on attaining the age of 21 years or (being female) attaining that age or marrying should be forfeited if the grandchild:

> . . . shall at any time before attaining a vested interest under the trusts herein-

> before declared be or become a Roman Catholic or not be openly or avowedly Protestant.

It was held that that was void on the ground of public policy, but BENNETT, J., also held that it was void for uncertainty, not, as I read his judgment, because the phrases used with reference to religion were in themselves too vague, but because the ambit of the clause must apply to infants. As he observes, at p. 668:

> . . . was it possible for a court on Aug. 31, 1910 [the date of the settlement] to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly and avowedly Protestant?

Thus, the crucial and essential element in his decision upon that point was the matter of infancy. It is to be noticed that that is the very point of uncertainty which, so far as the report goes, was argued by counsel in that case, because in the arguments of *Vaisey* and *Johnston* I find these sentences, at p. 661:

> It is impossible to predicate of an infant that he is of a particular religion, especially when he is to be "openly and avowedly Protestant." Therefore, if not void for uncertainty, the clause is void because it contains an impossible condition.

There is one more case to which I must refer before I come to the 1940 cases, and that is *Re Tegg, Public Trustee* v. *Bryant* (9), a decision of FARWELL, J. The language of the condition was as follows:

> I desire that my daughter and any children she may bear should at all times conform to and be members of the Established Church of England; and at no time may any child of hers go to or be sent to any Roman Catholic school for education; and if either my daughter or her children violate this my wish in any way then all the benefits accruing to her or them under this my will shall be considered as null and void.

It is to be observed that the daughter and her children are required to "conform to and be members of the Established Church of England," and on that language FARWELL, J., found that the provision was void for uncertainty. He said, at p. 881:

> In the present case the first condition which is imposed on this lady is that she herself and her children are at all times to conform to and be members of the Established Church of England. It may be—I am not deciding that—that if the testator had been content to say "should be members of the Established Church of England," that might be a matter of some certainty, but that is not enough, because the lady and her children must "at all times conform to." Now, speaking for myself, I do not in the least know what that means. It seems to me it would be quite impossible to say, here and now, whether any particular act or omission would be enough to render this condition operative. Whether a person, merely because he has been baptised and confirmed in the Church of England, but thereafter has ceased to pay any attention to any religious services at all, can be said to conform to the Established Church of England, I have not the least idea.

The decision, therefore, turned on the words "conform to," which the judge found to be too uncertain to be enforced. He did so for the reason which I indicated at the beginning of this judgment—namely, that they were words importing of necessity degree, and that there was no guide to the precise measure of conformity which was required. It is not necessary to discuss whether or not that decision on further examination might be found to be sound. It is language very different from the language used here, and the reason given by the judge was based upon the special language of that will. I therefore express no opinion one way or the other as to that decision.

I now come to the cases which have really given rise to the present difficulties. They were two cases, the second of which is *Re Blaiberg, Blaiberg and Public Trustee* v. *De Andia Yrarrzaval and Blaiberg* (10), A while the first, a decision of Farwell, J., is not reported, though its nature and the relevant language which he used are to be found sufficiently in the report of the later decision in the case before Morton, J. There were two different forfeiture clauses involved in that will. One of them was dealt with by Farwell, J., and the other was dealt with by B Morton, J. The clause with which Farwell, J., dealt was cl. 20 of the fourth codicil, in which the testator declared that, if any son, daughter or grandchild of his, or the widow of any son of his, should cease or fail to profess, or intermarry with any person who should not profess, the Jewish faith, in any such case there was to be a forfeiture. It is to be C observed that the language there is "cease or fail to profess," and it will be found, I think, that it was on those particular words that Farwell, J., thought it possible to say that the provision was void for uncertainty. The clause with which Morton, J., had to deal was a different one, and was contained in the second codicil, the language of which is set out at D p. 387 ([1940] 1 All E.R., at p. 633):

> And I do hereby declare that should any child or grandchild of mine at any time whether before or after my decease marry any person not of the Jewish faith such child or grandchild shall forfeit . . .

E That language in reference to the husband or wife is precisely the language which we have here. The only difference between the two cases is that in the present case there is the further reference to "Jewish parentage." However, Morton, J., basing himself upon the view of Farwell, J., in the earlier case, held that the phrase "not of the Jewish faith" was too vague to be enforced. While recognising that the decision F of Farwell, J., was on different language, Morton, J., cited certain passages in his judgment which assisted him in coming to his conclusion. I need not read the extracts relating to the general rule about construction of forfeiture clauses. I will read only extracts which Morton, J., gives from the judgment of Farwell, J., with relation to the construction G of the clause which was before Farwell, J. Farwell, J., said, at p. 390 ([1940] 1 All E.R., at p. 635):

> It seems to me that the phrase "cease or fail to profess" is a term capable of many meanings, and it would be impossible, in my judgment, in many cases to determine with any certainty whether a person had or had not ceased or failed to profess. Whether a person who, while outwardly professing to be a member H of the religion, in fact was not a member of it, would forfeit under this clause, I know not, and it would, I think, be impossible to ascertain.

Then Morton, J., puts this construction upon that language. He says, at p. 391 ([1940] 1 All E.R., at p. 635):

> As I read that observation Farwell, J., is saying: "It is really impossible to ascertain whether a person in fact, in his own mind, holds a particular religious belief. It is not a matter which the courts can ascertain with certainty."

Then he goes on to deal with the clause before him, which he finds to be even more uncertain than the clause which had to be construed by FARWELL, J., and he says this with regard to it, at p. 391 ([1940] 1 All E.R., at pp. 635, 636):

> It seems to me that, while "professing" a faith may be a matter of outward observance, the question whether a person is "*of* the Jewish faith" or not is a matter which lies in his or her own conscience and is a matter of belief. Supposing, for example, that the marriage had taken place in a synagogue, to my mind that would not establish that the other contracting party was of the Jewish faith. In my view it depends on whether he holds or does not hold certain beliefs. What are the beliefs which make a man of the Jewish faith or not of the Jewish faith I do not know. It is possible that the court could ascertain that by evidence. I do not know whether there would be any difference of opinion among persons called as witnesses to say what are the beliefs that it is necessary for a man to hold in order to be of the Jewish faith. But the further question, does a particular man hold those beliefs, is not, to my mind, a matter which a court can ascertain with certainty.

I need not repeat what I have already said as to the true method of construing the phrase "of the Jewish faith" without reference to subtle distinctions and in a commonsense way, and with particular regard to the avowed religious convictions of the person in question. However, I do wish to say a word about the view which MORTON, J., expressed that the question whether a particular man holds a particular religious belief is a matter which the court cannot ascertain with certainty. With great respect, I should have thought that that matter of fact would fall to be ascertained in the way in which other matters of fact have to be ascertained—namely, by evidence—and, once the meaning of the words in question is ascertained, I can see no difficulty in the court inquiring into that matter. There can be no question of such an inquiry being against public policy, and the questions of whether or not a man is of the Jewish faith and of whether his assertion that he adheres to that faith is credible or not are questions which, on the evidence, no jury should have any difficulty in deciding. Therefore, I must dissent from the view there expressed that that matter is one which it is not within the competence of the court to decide. It is to be noted that neither in that case nor, as we are informed, in the case before FARWELL, J., was reference made to the earlier cases. That I understand to be the case. Whether that be so or not, it is significant that in neither of these judgments is any reference made to the way in which conditions in restraint of religion (if I may coin such a phrase) have been dealt with in a long line of cases. In *Re Evans, Hewitt* v. *Edwards* (11), FARWELL, J., had to refer to his own decision in *Blaiberg's* case (10) and to that of MORTON. J. In *Re Evans* (11) the forfeiture clause referred to the child or grandchild becoming a convert to the Roman Catholic religion. FARWELL, J., distinguished his earlier decision and held that that clause was valid, on the ground that conversion was an overt act which could be ascertained with preciseness. If conversion involves, and has as its essential quality, as I apprehend that it does, the element of faith, how the question whether a man had been converted or not is to be settled by merely regarding overt acts I do not myself follow. I should have thought that, if there was one time at which a close inquiry into the tenets which a man held and the conviction with which he held them should be made, it would be at the moment of conversion, which has nothing whatever to do with ceremonial observance, but implies a change of faith. The argument addressed to us would have been equally valid if it were addressed to Farwell, J., on that ground. Farwell, J., however, drew that distinction, and, with regard to his previous decision in *Blaiberg's* case (10), he said, at p. 634:

> The ground upon which I came to the conclusion which I did in *Re Blaiberg, Blaiberg and Public Trustee* v. *De Andia Yrarrzaval and Blaiberg* (10), and, I think, the ground upon which Morton, J., based his decision, was that there the forfeiture clause was contemplating a state of mind and that that was something which the court could not ascertain with any certainty.

There the judge is adopting as his own the construction of Morton, J., of the reasons which he himself had given in *Blaiberg's* case (10). Then he goes on to make a further reference and to distinguish that case from the one before him, and he says, at p. 634:

> It was not a particular overt act such as definitely accepting a faith other than your own and renouncing the faith which you originally held.

With all respect to the judge, I cannot regard conversion as referring merely to definite overt acts. Then he says, at p. 634:

> The forfeiture clause in *Re Blaiberg, Blaiberg and Public Trustee* v. *De Andia Yrarrzaval and Blaiberg* (10) contemplated merely that, if a person married someone who did not profess the Jewish faith, there was to be a forfeiture. Whether there would be sufficient compliance with the condition of "professing the Jewish faith" merely by the particular person's attending synagogues, or doing other acts possibly suggestive, but not necessarily conclusive, of his professing that faith, was so uncertain that there were grounds there sufficient to render the forfeiture clause invalid. But in the present case it does not seem to me that that is the position. A person becoming a convert to the Roman Catholic faith must do definite acts and must be admitted into the Roman Catholic Church. Before being admitted into the Roman Catholic Church, such a person must renounce the religion which he or she had before . . .

There the judge gives a reason for his decision in *Blaiberg's* case (10) rather different from that which he had given a few sentences before, because he there laid stress, not on the state of mind into which the court could not inquire, but on the impossibility of saying what would be a sufficient compliance with the condition of professing the Jewish faith.

It is not necessary, for the purposes of this decision, for this court to say that any of the recent decisions to which I have referred must stand overruled, other than the decision of Morton, J., in *Blaiberg's* case (10). The decision of Farwell, J., in *Blaiberg's* case (10) and his decision in *Re Evans, Hewitt* v. *Edwards* (11) (which, of course, was decided in favour of the validity of the forfeiture clause) were on different language, as to which different arguments might be addressed to us. Moreover, although those cases have been touched upon and the various considerations affecting the language used have been to some extent discussed before us, it would be improper for this court, without hearing full argument on language of the same character, to say that any of these cases was wrongly decided. That question can be decided if and when a will

similarly framed comes before this court. However, the decision of MORTON, J., in *Blaiberg's* case (10) is a decision which, in my opinion, cannot stand with the decision which should be given in the present case. In so far as the reasoning of FARWELL, J., is inconsistent with the reasons
A which this court considers are the correct ones, and are reasons which agree with the reasons of MORTON, J., those reasons, in my judgment, cannot be supported.

There is one other matter to which I must now refer before concluding this judgment. Numerous statutes have been cited to us in which
B phrases occur such as "of the Jewish religion," "profess the Jewish religion," and so forth. In one old Act of Anne there are the words "Jewish parents," and in one Act there is the word "Jew." All these phrases have been used by the legislature in various Acts of Parliament, to which I do not propose to refer in detail. It is perfectly true that the
C question whether or not a phrase has a sufficiently clear content must depend on the context in which it is used, and that a phrase which in one context has a clear and ascertainable content may not have such a content in a different context, but it is significant that the legislature apparently felt no difficulty in adopting for purposes of the criminal law,
D among others, and in Acts such as the Factories Act, 1937, and so forth, expressions which we are now told are so vague that no court could possibly ascertain what they mean, because the question of a man's religious faith is a thing into which the court cannot inquire, or cannot inquire with the hope of any certain result. It seems to me that it
E does throw considerable light on this argument, which, as I say, has only appeared quite recently, when one sees how the legislature has dealt with religious questions such as that. In the result, the judgment of BENNETT, J., in my opinion, cannot stand, and an appropriate declaration must be made.

F *Appeal allowed.*

Solicitors: *Hunt & Hunt* (for the appellants); *L. A. Hart* (for the first and second respondents); *Burton & Ramsden* (for the third respondent); *Whitehouse, Gibson & Oldershaw* (for the remaining respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

YORKSHIRE DALE STEAMSHIP CO., LTD. *v.* MINISTER OF WAR TRANSPORT.

THE COXWOLD.

[Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.), **July 28, 29, August 5, 1941.**]

Insurance—Marine insurance—War risks—Ship in convoy carrying petrol for use of armed forces—Stranding.

The Coxwold was requisitioned and was sailing in convoy with a cargo of petrol for His Majesty's forces then engaged in the Norwegian campaign. It was admitted that she was engaged in a warlike operation. On a night when visibility was bad the ship, though keeping to the main course of the convoy, stranded. The arbitrator found as a fact that the stranding was not due to the negligence of those on board the Coxwold, but that there had been an unexpected and unexplained tidal set, which carried her some miles off her course. The arbitrator also found that, if and so far as it was a question of fact, the loss was the direct consequence of the warlike operation on which the vessel was engaged. It was contended that the loss came within the exception : " warranted free . . . from all consequences of hostilities or warlike operations " :—

Held : (i) what was the the proximate cause of the loss is a question of law for the court and not a question of fact to be finally decided by the arbitrator.

(ii) the loss was caused by the unexpected and unexplained tidal set and, as the warlike operation could have had no effect upon this, the loss was due to perils of the seas and was not a consequence of the warlike operation on which the vessel was engaged.

Decision of Viscount Caldecote, L.C.J., ([1941] 2 All E.R. 776) *reversed.*

[**EDITORIAL NOTE**. This case was decided in the court below upon the ground that, once a vessel is engaged in a warlike operation, unless there is some plain intervening cause which is found as a fact to have been the cause of the damage, the loss is one due to the warlike operation. The Court of Appeal, in reversing this decision, has examined the facts and found that the loss was in fact caused by perils of the seas. Such a loss being within the risks insured by the policy, the onus is clearly upon the insurers to show that they are exempt from liability under the exception. They could only do this by showing that the proximate cause of the loss was the warlike operation, and, upon the view of the facts taken by the Court of Appeal, they had failed to prove this .

As to Warlike Operations, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316, 317, para. 441 ; and for Cases, see DIGEST, Vol. 29, pp. 226-230, Nos.1836-1861.]

Cases referred to :

(1) *Ionides* v. *Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259 ; 29 Digest 229, *1854* ; 32 L.J.C.P. 170 ; 8 L.T. 705.

(2) *Britain S.S. Co.* v. *R.*, *Green* v. *British India Steam Navigation Co.*, *British India Steam Navigation Co.*, v. *Liverpool & London War Risks Insurance Assocn.*, [1921] 1 A.C. 99 ; 29 Digest 230, *1860* ; 89 L.J.K.B. 881 ; 123 L.T. 721.

(3) *British & Foreign S.S. Co.* v. *R.* [1918] 2 K.B. 879 ; 29 Digest 228, *1849* ; 87 L.J.K.B. 910 ; 118 L.T. 640.

(4) *A.-G.* v. *Ard Coasters, Ltd.*, *Liverpool & London War Risks Insurance Assocn., Ltd.* v. *S.S. Richard De Larrinaga Marine Underwriters*, [1921] 2 A.C. 141 ; 29 Digest 228, *1851* ; 91 L.J.K.B. 31 ; 125 L.T. 548.

(5) *Commonwealth Shipping Representative* v. *Peninsular & Oriental Branch Service*, [1923] A.C. 191 ; 29 Digest 226, *1838* ; 92 L.J.K.B. 142.

(6) *A.-G.* v. *Adelaide S.S. Co.*, [1923] A.C. 292 ; 29 Digest 228, *1850* ; 92 L.J.K.B. 537 ; *sub nom. Adelaide S.S. Co.* v. *R.*, 129 L.T. 161.

(7) *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson*, [1929] A.C. 514 ; Digest Supp. ; 98 L.J.K.B. 408 ; 141 L.T. 275.

(8) *Board of Trade* v. *Hain S.S. Co.*, [1929] A.C. 534 ; Digest Supp. ; 98 L.J.K.B. 625 ; 141 L.T. 435.

APPEAL by the respondent from a judgment of VISCOUNT CALDECOTE, L.C.J., dated July 4, 1941, and reported [1941] 2 All E.R. 776. The facts are fully set out in the judgment of SCOTT, L.J.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Cyril T. Miller* for the appellants.

A. J. Hodgson for the respondent.

SCOTT, L.J. : This is an appeal from a judgment of VISCOUNT CALDECOTE, L.C.J., in favour of the respondent company, the owners of the Coxwold, against the Minister of War Transport. On Sept. 7, 1939, the vessel was requisitioned by the Ministry of Shipping upon the terms of a form of charter party known as T.99A. Under it the charterer took the war risk and the owner the marine risk. At about 2.45 a.m., on May 7, 1940, the vessel suffered damage by stranding on the west coast of Skye when bound in convoy from Greenock to Narvik with a cargo of petrol for use by His Majesty's Forces in the Norwegian campaign. The question at issue was whether the loss was by a war or a marine peril. VISCOUNT CALDECOTE, L.C.J., held that it was by a war peril and the Minister appealed to this court.

Under Form T.773, incorporated in T.99A, the Minister took the following war risks : (i) the risks excluded by the f.c. and s. clause contained in an ordinary English policy—namely, *inter alia*, " the consequences of hostilities or warlike operations "—and (ii) loss of or damage to the ship caused by hostilities or warlike operations. The convoy contained 4 merchant vessels and 4 destroyers and the Minister admitted that the Coxwold was at the material time engaged on a warlike operation. The admission was clearly right, and it is unnecessary to go into details.

At about 1.25 a.m., the Coxwold lost contact with the convoy. There was bad visibility and there were only shaded stern lights. Apparently she kept on the main convoy course till 2.30 a.m., when her second officer, who was in charge on the bridge, noticed a number of red and green lights, some on the port bow, some on the starboard bow, and others right ahead. Thinking they were the lights of an oncoming convoy, he switched on his own side lights and reduced to half-speed, there being a heavy rain squall at the time. He altered course half a point to starboard and passed through without collision, altering course again to the main convoy course when he was clear.

It turned out afterwards that the convoy through which he had passed was his own convoy, apparently retracing its course on some exceptional manœuvre. Almost immediately afterward, just before 2.45 a.m., he noticed a wash ahead and ran on the rocks. The arbitrator found as a fact that there was no negligent navigation on the part of the Coxwold, that the course steered appeared to be a safe one and was accurately followed, but that "there was an unexpected and unexplained tidal set which carried the Coxwold some miles to the eastward," that "this set could not be detected by those on board the Coxwold," and that "from 2.30 a.m. to the stranding there was a heavy rain squall." Para. 9 of his finding of fact was as follows :

> If and so far as it is a question of fact, I find that in the above circumstances the loss in question was the direct consequence of the warlike operation on which the Coxwold was engaged.

By paras. 11 to 13 he left it to the court to say whether it was a war or a marine loss.

The issue is very nearly whether a loss during a warlike operation is therefore a loss by a warlike operation—that is, proximately caused by it. There is no doubt that the words "consequences of a warlike operation" are a description of the peril constituting the cause of the loss, and that that cause must be the proximate cause within the Marine Insurance Act, 1906, s. 55. That was decided in the clearest terms in *Ionides* v. *Universal Marine Insurance Co.* (1), and the section did not alter the law. Consequently, cl. 1 (1) (*b*) (i) of Form T.773 adds nothing to subcl. (1) (*a*). In my opinion the stranding, in the circumstances I have described, was not only *prima facie* a loss by perils of the sea, as many war losses may also be, but was, on all the facts found, really and exclusively such a loss, and in no sense a loss by "warlike operations."

In view of the decisions of the House of Lords in *Britain S.S. Co.* v. *R.* (2), usually spoken of as the *Petersham* case and the *Matiana* case, that sailing without lights even during war is not *per se* a warlike operation, the reliance by the Court of Appeal in *British & Foreign S.S. Co.* v. *R.* (3) on that fact as evidencing a warlike operation must be treated as mistaken. Sailing without lights is not the proximate or direct cause of a stranding (the *Matiana* case (2)), nor of a collision with another merchantman (the *Petersham* case (2)), nor is either loss the proximate or direct result of the warlike operation of sailing under convoy orders, such as zig-zagging : see especially the approval by Lord Atkinson of the views of Warrington and Atkin, L.JJ., at pp. 119-122. On the other hand, where a collision takes place through vessel A, engaged upon a warlike operation, running into a vessel B, whether or not B is also engaged upon a warlike operation, A suffers a loss by a war peril : see *A.-G.* v. *Ard Coasters, Ltd.* (4), particularly the first sentence of the opinion of Lord Dunedin at p. 152, and *Commonwealth Shipping Representative* v. *Peninsular & Oriental Branch Service* (5). In *A.-G.* v. *Adelaide S.S. Co.* (6), Lord Sumner said, at p. 301 :

> By admission the Warilda's operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the Petingaudet was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation. Had it been done wilfully the case might

be different. There might, for example, have been an abandonment of the ship's warlike operation altogether, but it is unnecessary to do more than save such a case.

On the other hand, if the commercial ship is, so to speak, the actor in the collision, the loss of the other ship may not be a war-risk loss. A The above decisions on one side or the other of the line indicate that the conclusion in the present appeal should be that the Coxwold was not lost by a war peril. However, the decision of the House of Lords in *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson* (7), I think, clears the position a little more. There the Clan Matheson and B the Western Front, two ships in a convoy, collided, without any negligence on the part of either. The Western Front was engaged in a warlike operation, though the Clan Matheson was not. What happened was that the steering gear of the Clan Matheson suddenly broke down and she came off seven points into the Western Front. It was held that the loss C was not a consequence of a warlike operation inasmuch as the sole proximate cause was the breakdown of the Clan Matheson's steering gear. In *Board of Trade* v. *Hain S.S. Co.* (8), both vessels were to blame for a collision. One, the Roanoke, was engaged in a warlike operation, while the other, the Trevanion, was not. It was there held that the D Trevanion's loss was by a war peril.

What really happened in the present case was that, although the Coxwold was no doubt engaged in a warlike operation (because she was still carrying a war cargo for war purposes), yet the contents of her cargo had nothing to do with the unknown and unexpected set of the tide E which drove her on to the rocks. As MACKINNON, L.J., said during the argument, if a sudden great wave had fallen down on her and carried away her bridge, the sea peril would have been the sole cause of her particular average loss. How does the strange current differ ?

Counsel for the respondents argued the case both clearly and forcibly, F and, in justice to him, I will state his arguments. The first was that, in a warlike operation, a loss *prima facie* suffered by the impact of the vessel moving in the course of that operation is a loss by war risk, and he relied on *A.-G.* v. *Ard Coasters, Ltd.* (4), per LORD FINLAY, at pp. 147, 148, and on *A.-G.* v. *Adelaide S.S. Co.* (6), per LORD SUMNER, at p. 301. G The second was that negligence does not displace that presumption. The third was that error of judgment or mere misfortune does not displace that presumption, unless the sole cause be proved to have been inevitable accident. The fourth was that causes not warlike may have contributed and yet the loss remain a war loss. In substance, he con- H tended that the warlike operation must be regarded as continuing to have effect down to the moment of the accident. I think that the fallacy of his seemingly logical argument is that, in the present case, the war character of the vessel's adventure was nothing more than an irrelevant circumstance, and that there was no chain, much less a direct link, of causation between that character and the stranding. The vessel might have been painted as a hospital ship, but neither that character nor that appearance as such would have caused her to run on to the rocks. The *reductio ad absurdum* of that argument seems to be that, if it were well-founded, a King's ship navigating during war could never be lost by a marine peril. Counsel for the respondents did also argue that there was a finding of fact that the loss was by a war peril and that we could not go behind that finding, but the question of *causa proxima*, when all the facts are stated, as here, is a pure question of law.

MacKinnon, L.J.: Once again this case raises the problem of the proper construction and effect of ten infamously obscure words: "Warranted free . . . from all consequences of hostilities or warlike operations." It is to me, personally, a melancholy reflection that during my last ten years at the Bar I was compelled, as advocate or arbitrator, to spend more time upon the consideration of the effect of these ten words than upon any other problem. They come back now to me as *crambe repetita*, and the cabbage is of the stalest.

A marine insurance policy in ordinary form covers risks of four different kinds—namely, (i) perils of the seas, (ii) fire, (iii) robbery, (iv) capture or other war perils. The earlier part of the f.c. and s. clause is comparatively lucid. "Free of capture, seizure, arrest, restraint or detainment" cuts out of the policy the expressed risks: "surprisals, takings at sea," etc. However, the final words "free from all consequences of hostilities or warlike operations" are fatally obscure. They do not only cancel such insured perils as "enemies." They are a limitation of liability in respect of loss caused by all the insured perils. No one can define with accuracy their exact result, even with the guidance of the innumerable cases in the books. This is not the fault of the law or of the judges. It is the fault of those who chose very many years ago to frame a vital clause in their contracts in language of such obscurity and of those who, despite the recurring proof of that obscurity, have insisted on continuing the use of those words and abstained from any attempt to draft their contracts in more intelligible terms.

There are now an immense number of cases about the effect of these nine or ten words as applied to a great variety of facts. Many of them were cited to us. It is perhaps a truism to say that reported cases are only of value towards the decision of later cases in so far as they lay down principles of law or of construction. I confess that very few of the cases cited to us seem to me to lay down any principle or principles of construction of these ten words. Moreover, as many of them were decisions of the House of Lords, and are, therefore, binding upon us, it is possible to find in them isolated sentences by various noble and learned Lords in regard to the effect of these words upon the facts of the particular case under appeal. However, unless those sentences enunciate some principle of construction, I do not think it is profitable or legitimate to say: "The facts of the case in which this or that sentence was used are rather like the facts in this case, and, therefore, this case should be decided in the same way." One of the few cases which does undoubtedly lay down a principle of construction of these words is one of the earliest of all, *Ionides* v. *Universal Marine Insurance Co.* (1) in 1863. That case decided that, in construing the word "consequences," the primary rule as to causation in marine insurance must be used. A "consequence," to be within these words, must be a loss proximately caused by the specified "hostilities" or "warlike operations."

The vessel in this case sustained loss or damage by going aground on a reef of rocks. *Prima facie*, there can be no doubt that such loss or damage is proximately caused by perils of the seas. The question is whether an underwriter sued for such loss as a loss by perils of the seas could, upon the further facts found as to the cargo of the vessel and the nature of her voyage, successfully defend the claim by a plea that the loss was proximately caused by hostilities or warlike operations. Those further facts are that the vessel, while under requisition by the government, was sailing in convoy with a cargo of petrol to be delivered at Narvik for use by the Army in the campaign in Norway. The convoy was in charge of a naval officer. It was guarded by destroyers, and no navigating lights were exhibited.

It was admitted by the Minister that the Coxwold, while carrying this cargo upon this voyage, was engaged upon a warlike operation. If the contract had provided that no loss or damage should be recoverable under the policy at a time when the insured vessel was engaged in a warlike operation, the answer to the claim would be clear and easy. However, counsel for the respondent did not suggest that this was the effect of the clause. He admitted that, while the Coxwold was upon this voyage, and was, therefore, herself engaged upon a warlike operation, she might sustain damage which would be recoverable under a policy containing this clause. That admission was in answer to my suggestion: "Suppose on this voyage she met very bad weather and the violence of the waves carried away her bridge. Would that not be a loss by perils of the seas, and could you contend that it was a consequence of warlike operations?" He replied that it would be such a loss and that he could not say that it was within the exception, but as I gathered, that was because of the catastrophic nature of the casualty I had suggested.

To establish a loss by perils of the seas, it is not necessary to prove any catastrophic disaster. The definition in the Marine Insurance Act, 1906, Sched. I, r. 7, is as follows:

> The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

However, there may be a fortuitous accident or casualty without any catastrophe or violence. If a vessel dragged her anchor, because it was insecure, and drifted ashore, any resulting damage would be a loss by perils of the seas. In this case, the Coxwold was carried off her course, as is stated in the special case:

> . . . by an unexpected and unexplained tidal set which carried her some miles to the eastward . . . and this set could not be detected by those on board the Coxwold.

Being so carried off her proper course, she struck the rocks and sustained damage. With an ordinary marine policy, there cannot be the slightest doubt that this damage could be claimed as a loss by perils of the seas. How, then, if the policy contained the f.c. and s. clause, could the underwriter successfully plead that this loss, so obviously caused by perils of the seas, was not recoverable, seeing that it was proximately caused by a warlike operation ? The only matters to be relied on for that suggestion would be (i) the nature of her cargo, and (ii) the fact that she was proceeding with that cargo from Greenock to Narvik. In other words, while upon that voyage with that cargo the vessel was herself engaged upon a warlike operation. However, the clause does not say : "No loss shall be recoverable while the vessel is engaged on a warlike operation." For my part, when damage manifestly caused by perils of the seas has been sustained, I can see no logic in the contention that, because the vessel was on a voyage which was itself a warlike operation, this damage by sea perils must be deemed to be a consequence of a warlike operation.

From one or other of the isolated sentences in the cited cases, counsel for the respondent relied on the proposition that, if a destroyer or other warship was steaming across the seas and collided with a merchant ship, the damage sustained by that merchant ship would be a consequence of a warlike operation. That may be so, but I cannot think it a proper corollary from that to infer that, when a vessel, by reason of her cargo and her voyage, is engaged on a warlike operation, any damage she sustains by impact with any hard object is a consequence of warlike operations. Nor can I see any logic in the distinction between damage to the vessel while on such a voyage by her bridge being washed away in a storm and damage to her bottom by stranding upon an unexpected rock.

In the result, this seems to me clearly to have been damage to this ship proximately caused by perils of the seas, and I do not think that the marine risk underwriters could resist a claim for that loss by contending that, by reason of the nature of her cargo and her port of destination, the loss came within the f.c. and s. clause as a consequence of warlike operations. Therefore, I think that this appeal should be allowed with costs here and below, and the alternative award of the arbitrator in para. 13 of the special case should be upheld.

Luxmoore, L.J. : The short question to be determined in this appeal is, in substance, whether the damage suffered by the motor vessel Coxwold belonging to the respondents (to whom I will refer as the owners) was the direct consequence of warlike operations or of a marine peril. Viscount Caldecote, L.C.J., held that it was the direct consequence of warlike operations and in so doing he upheld the award of Sir Robert Aske, K.C., to whom the parties had submitted the question in the first instance. The arbitrator, at the request of the parties, stated his award in the form of a special case. After stating the material facts with sufficient clarity to avoid any question or doubt with regard thereto, he stated in para. 9 of the special case :

> If and so far as it is a question of fact, I find that in the above circumstances the loss in question was the direct consequence of the warlike operation on which the Coxwold was engaged.

It was argued on behalf of the owners, both before VISCOUNT CALDECOTE, L.C.J., and in this court, that this was a finding of fact which could not be challenged, because there was some evidence on which it could be based. VISCOUNT CALDECOTE, L.C.J., rejected this argument, and it seems to me that he was plainly right in so doing from a consideration of the numerous reported decisions to which our attention was called. Those decisions have invariably treated the ultimate question—namely, what was the proximate cause of the loss under consideration—as one to be determined by the court. Indeed, the arbitrator so treated it in para. 11 of the case, where he states the question for the decision of the court in these words :

> . . . whether, upon the true construction of the terms of the said charterparty and Form T.773 and upon the facts found by me, the claimants [the owners] are entitled to recover against the respondent [the Minister of War Transport] for the loss sustained in respect of the stranding of the Coxwold.

The facts which are material to be considered are these. The Coxwold was requisitioned by the Minister of War Transport, and the terms of the requisition were regulated by a charterparty in the well-known form referred to as Form T.99A, which incorporates the conditions set out in Form T.773 relating to war risk liability or war risk insurance in respect of vessels serving on the conditions of Form T.99A. By Form T.99A, cl. 2, the owners' liabilities are defined as including the liability to provide and pay for :

> . . . the insurance of the ship except as otherwise provided in cl. 23.

By cl. 23, it is provided as follows :

> . . for provisions relating to war risks liability or insurance see attached Form T.773, the provisions of which are herewith incorporated.

Form T.773 provides as follows :

> (1) The risks of war which are taken by the charterers [the Minister of War Transport] are : (*a*) Those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause : " Warranted free of capture, seizure, arrest, restraint, or detainment and the consequences thereof or of any attempt thereat, also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not, civil war, revolution, rebellion, insurrection or civil strife arising therefrom or piracy " ; (*b*) loss of or damage to the ship hereby chartered caused by : (i) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom ; (ii) mines, torpedoes, bombs or other engines of war.

It was recognised by counsel for each of the parties at all stages of the litigation that the effect of the provisions to which I have referred is to place upon the Minister of War Transport the liability for loss arising from risks of war arising in consequence of warlike operations, while the liability for loss arising from marine perils remained with the owners.

The Coxwold was running under these terms on May 6, 7, 1940, in a convoy which was formed near Rothesay at about 2.30 a.m. on May 6. No navigating or other lights were shown by any of the vessels in the convoy, except that two of the vessels in the first line—namely, the Calomet and the Mashubra—carried dimmed and shaded stern lights. The convoy pursued a zig-zag course under the orders of the commodore, and there were certain alterations of course which are set out in para. 5 (*c*) of the case stated. Shortly after 1.25 a.m. on May 7 the Coxwold got out of the convoy, and the several actions referred to in para. 5 (*e*) and (*f*) of the case were taken, to which it is not material to refer. Subsequently, at 2.45 a.m. on the same day, the Coxwold stranded on the Damsel Rocks in the island of Skye, and sustained the loss claimed in the arbitration proceedings. The arbitrator found that there was no improper navigation of the Coxwold and that the course followed by her was that set for the convoy and was a safe one, but that there was an unexpected and unexplained tidal set which carried her some miles to the eastward, and that this set could not be detected by those on board. He also found certain facts with regard to the visibility, the weather, and the amount of light shown by the Neist Light in order to explain his finding that the set of the tide could not have been detected by those on board the Coxwold.

It seems to me plain that the arbitrator has found that the proximate cause of the stranding of the Coxwold was what he described as the unexpected and unexplained tidal set. Further, it seems to me equally plain that, but for the existence of a warlike operation, this could only be described as a marine peril. It was admitted, however, on behalf of the Minister of War Transport that the Coxwold was on May 6 and May 7, including the time of the stranding, engaged in a warlike operation, in that she was carrying from one war base to another a cargo of petrol in tins for the use of the British military forces in the field in Norway.

It was frankly admitted by counsel for the owners, although the contrary was argued before the arbitrator and before Viscount Caldecote, L.C.J., that the fact that a loss occurred during the course of a warlike operation cannot necessarily afford the answer to the question whether it occurred in consequence of it, but he argued that in the present case it was sufficiently established that the loss occurred in consequence of the warlike operation admitted. Numerous cases in which the question has been debated whether loss has arisen in consequence of warlike operations are to be found in the books, many of them being decisions of the highest tribunal. It is not surprising that passages can be found in the opinions of one or other of the noble and learned Lords who were parties to the several decisions to support the arguments of counsel for either party in the present case, and I confess that it is not an easy task to reconcile the various *obiter dicta* relied on, but, after all, the question can only be dealt with in each case on the particular facts peculiar to it, and similarity of fact, as distinguished from identity, is not always a safe or reliable guide.

The main principle to be borne in mind in cases like the present is that laid down in the Marine Insurance Act, 1906, s. 55 (1), which provides as follows :

> Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

This section did not make new law. It simply recognised and stated the principles laid down in the decision of the Court of Common Pleas in *Ionides* v. *Universal Marine Insurance Co.* (1). The policy of insurance in that case contained an exception which included " consequences of hostilities." The subject-matter of the insurance was a cargo of coffee on board the Linwood, which was wrecked. The insurers sought to escape liability because, owing to the existence of the war between the Northern and Southern States of America, officers appointed by the latter had extinguished the light which before that war had been kept burning at Cape Hatteras. ERLE, C.J., said, at p. 284 :

> . . . the extinguishment of the light was undoubtedly an act of hostility on the part of the confederates towards the federals.

Then he asked the question, at p. 284 :

> But was the loss the consequence of hostilities ? I agree . . . that the question is entirely one of construction, and that the intention of the parties is to be gathered from the contract itself, taking it with the surrounding circumstances . . . I agree that the words of the exception in the policy . . . are to be construed as they would be if the assured had re-assured his cargo against the perils which are excepted by the warranty now in question; so that to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim *causa proxima non remota spectatur* is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it . . . Was the putting out of the light at Cape Hatteras so immediately connected with the loss of the ship as to make the one the consequence of the other ? Can it be said that the absence of the light would have been followed by the loss of the ship if the captain had not been out of his reckoning ? It seems to me that the two events are too distantly connected with each other to stand in the relation of cause and effect.

Then he put a number of hypothetical cases to illustrate the proposition that, though the existence of the hostilities may be the cause without which the loss would not have happened, yet the proximate cause of loss may be by peril of the sea and not in consequence of hostilities. It is sufficient to refer to the last hypothetical case. He said at pp. 286, 287 :

> Take another instance. The warranty extends to loss from all consequences of hostilities. Assume that the vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel in ignorance of the fact enters this channel and his ship is blown up : in that case the proximate cause of the loss would clearly be the consequence of hostilities, and so within the exception. But suppose the master, being aware of the danger presented in the one channel, and in order to avoid it attempts to make the port by the other, and by unskilful navigation runs aground

> and is lost, in my opinion that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities but a loss by a peril of the sea and covered by the policy.

He applied the principles he had stated to the facts relating to the wreck of the Linwood, and held that the absence of the light was not the proximate cause of the loss and that that loss had occurred by reason of a marine peril. The principles laid down have repeatedly been referred to and have always been accepted without question. They appear to me to cover the present case, for there is, as far as the application of the principles is concerned, no substantial difference between the phrase "in consequence of hostiltiies" and the phrase "in consequence of warlike operations." In the present case, the Coxwold was sailing without lights in convoy, carrying a cargo of petrol in tins for the use of the British military forces in Norway, her destination being the port of Narvik. The sailing without lights is not in itself a warlike operation (the *Petersham* case (2)), nor is the sailing in convoy (the *Matiana* case (2)). The only warlike operation on the part of the Coxwold was the carrying of material—namely, petrol—for war purposes to a destination in the seat of war, but neither the fact that the material was required for war purposes nor the fact that its destination was a war base can have had any effect on the influence of the unexpected and unexplained set of the tide upon the Coxwold. The tidal set would have carried the Coxwold on to the Damsel Rocks whatever her cargo and her destination, and it is for this reason, I think, that her stranding was the direct consequence of a marine peril, for the warlike operation had no greater part in causing it than it would have had if the stranding had been caused by a storm of sufficient force to drive her on to the rocks.

Counsel for the owners argued that there was a principle to be deduced from the decided cases that, where a ship is engaged in a warlike operation, there is a *prima facie* presumption that any loss suffered during its continuance is a loss in consequence of that operation, and consequently the onus of proving the contrary is on the person seeking to escape liability. I am unable to spell out any such principle from the cases referred to. Indeed, the existence of such a principle would be contrary to the *ratio decidendi* of the *Petersham* case (2), in which LORD ATKINSON said, at p. 113:

> Collision at sea is *prima facie* a sea risk. The burden of rebutting the presumption in this case is on the suppliants [who were asserting that the collision was the consequence of warlike operations]. Whatever be the true meaning of the words "hostilities" and "warlike operations" as used in . . . the charterparty . . . the suppliants can, on the facts proved, only recover the damages sued for by establishing affirmatively that this collision was not a sea peril, but was the direct and proximate consequence of an act of "hostility" or of a "warlike operation."

It would be wholly illogical to shift the onus by reason of the existence of a warlike operation which cannot by any possibility affect in any manner the operation of the sea peril suffered. It is to be observed that counsel for the respondent owners admitted that, if it was established that the sole cause of the loss was a peril of the sea or some other non-warlike operation, the onus of displacing what he stated was the *prima facie* presumption was discharged He further argued that an express finding that the peril of the sea or the non-warlike operation was the sole cause of the loss was essential. As I have already stated, I think that the finding of the arbitrator was plainly to the effect that the tidal set was the sole cause of the damage, for, although he did not state it in so many words, he negatived the existence of any negligence or other contributory cause.

I have not thought it necessary to refer in detail to the cases to which our attention was called, because they are dealt with in the judgment of SCOTT, L.J., which I have had the privilege of considering, and with which I find myself in complete agreement. I have also had the same privilege with regard to the judgment of MACKINNON, L.J., with which I also agree. In my judgment, for the reasons given by SCOTT and MACKINNON, L.JJ., and for those I have endeavoured to express, the appeal should be allowed, and the order of VISCOUNT CALDECOTE, L.C.J., should be discharged.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Treasury Solicitor* (for the appellant); *Holman, Fenwick & Willan* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NORWICH RATING AUTHORITY *v.* NORWICH ASSESSMENT COMMITTEE AND FOUNTAIN.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Tucker, J.), **July 17, 18, 1941.**]

Magistrates—Appeal from quarter sessions—Case stated—Remission back to sessions—Previous practice of High Court only to give decision finally disposing of such a case—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 25 (2)—*Rating and Valuation Act,* 1925 (c. 90), *s.* 31 (5).

Rates and Rating—Valuation list—Amendment—Proposal based on accounts 5 years old—Automatic percentage increase of previous value—Validity—Rating and Valuation Act, 1925 (c. 90), *s.* 37.

In 1939, a rating authority made a proposal for the amendment of the valuation list in respect of the assessment of a tied public house in order to make that assessment conform with the decision of the House of Lords in the *Robinson* case (6). It appeared from a statement made by the valuation officer that, at the hearing before the assessment committee, he had based the valuation upon figures relating to the years 1931-1933 and that he had not made a separate valuation of each tied public-house but had added a percentage based on barrelage to the valuation of all such properties. Upon an appeal to quarter sessions, the recorder, holding that such a method of valuation was bad in law, dismissed the appeal without hearing any evidence. The recorder stated a case for the opinion of the court which, if it was held that he was wrong in not hearing the evidence of the parties, would require the matter to be remitted to him for further hearing. It was contended (i) that the court had no jurisdiction to entertain an appeal by way of case stated which would not finally dispose of the issues between the parties and (ii) that the method of valuation adopted by the valuation officer was bad in law:—

Held: (i) although the court could not finally dispose of the issues between the parties but must remit the matter to quarter sessions, this was not a fatal objection to a case stated, such a case being provided for by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2). The cases decided before that enactment decided the matter as one of practice and not of jurisdiction.

(ii) on the hearing at quarter sessions, the matter is to be heard *de novo* and all relevant evidence may be given, unless a party has so limited his case before the assessment committee as to preclude him from raising any other matter on the appeal.

(iii) in the circumstances of the present case, although the valuation officer had directed his calculations to the wrong date and might have adopted a wrong method of valuation, the rating authority could adduce evidence at quarter sessions to show the true value of the premises at the material date.

[**EDITORIAL NOTE.** The jurisdiction of an English court sitting as a court of appeal is subject to varying limitations. In general, it has a perfectly free hand to deal with a question of law provided that it has been raised in the court below. On questions of fact, a court of appeal is often limited by the findings of fact of the court below if there was evidence to support them. The Court of Appeal, however, in an appeal from a hearing in the High Court by a judge alone can review his decision on questions of fact as well as on questions of law. Such an appeal is sometimes described as a hearing *de novo*, but, as the review of the facts is based upon a reading of a transcript of the evidence, it is not strictly a hearing *de novo*, and that term is more properly applied to the hearing of an appeal to quarter sessions, where the witnesses again go into the witness-box and repeat their evidence, and are again cross-examined. In the latter case, not only has the court the words of the evidence to guide it, but also it both sees and hears the witnesses, and can itself assess what credibility is to be given to the evidence of each of them. The nature of an appeal to quarter sessions is, therefore, peculiar to that form of appeal, and it arose, no doubt, out of that peculiarity that, on a further appeal to the High Court by way of case stated, the latter court insisted that quarter sessions should hear the witnesses and arrive at its conclusions of fact before stating a case. There would be many practical reasons for this. It is not desirable, both for reasons of convenience and of expense, that witnesses should be brought to the court more than once for the purposes of an appeal. It is always possible that, when the facts are fully ascertained, the question of law thought to arise on the appeal may not require to be decided, and the courts have always been adverse to deciding cases on a hypothetical state of facts. Thus it came about that the High Court refused at one time to entertain a case stated which did not find all the facts, and then stated that, if the law were one way, the appellant should succeed, and, if the contrary were the law, the respondent should succeed, or, in the words used herein, the court was able, by its answer to the case, finally to dispose of the matter, and did not have to remit the case to quarter sessions for a rehearing. There were numerous decisions to this effect, but, by the Supreme Court of Judicature (Procedure) Act, 1894, s. 2, it was enacted that the High Court might remit such a case to quarter sessions with a direction for the rehearing of the case, and this was re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2). The matter standing thus, the jurisdiction of the High Court at the present time to remit such a case cannot be doubted, but the older authorities have been retained in the textbooks, and, as the practice in this matter had a very practical foundation, it would seem that in practice quarter sessions should hear fully every case, and should state any case arising therefrom in such a way that the High Court may finally dispose of the matter ; but, where they have not done so, the case must be remitted. That was the point taken by the preliminary objection in this case. The point taken upon the substantive case is also of general importance. Before 1925, alterations in the rateable value of premises were made by supplemental valuation lists. These lists were compiled by the rating authority and upon them the rate was made. The ratepayer's time for objection was after the rate was made, when the objection was to the validity of the rate. This procedure was altered in 1925. An alteration in the rateable value of premises now gives occasion for a proposal for amendment of the valuation list, and the ratepayer has an opportunity of resisting any increase before the valuation list is amended, and his proper procedure is to object to the proposal, and not to allege the invalidity of a rate when it has been made. Thus, whereas before 1925 the rate was bad in law if the valuation was made upon an improper basis, it cannot now be an objection in law to a proposal for amendment of the list that the proposal is bad in law. The proper procedure on the part of the occupier now is to adduce figures and arguments showing how the proposed amendment is wrong, and to suggest what the right figure should be. This alteration in procedure involves a consequential alteration in the application of the principle stated in *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (7), but only so far as is necessary to adapt it to the altered procedure.

As to Practice of the High Court on Appeals from Quarter Sessions, see HALSBURY, Hailsham Edn., Vol. 21, pp. 744, 745, para. 1289 ; and for Cases, see DIGEST, Vol. 33, pp. 452-456, Nos. 1635-1685.

As to Necessity for Valuation of Each Individual Property, see HALSBURY, Hailsham Edn., Vol. 27, p. 478, para. 910 ; and for Cases, see DIGEST, Vol. 38, pp. 581, 582, Nos. 1155-1158.]

Cases referred to :

(1) *R.* v. *Kesteven JJ.* (1844), 3 Q.B. 810 ; 33 Digest 441, *1509* ; 13 L.J.M.C. 78 ; 3 L.T.O.S. 55.

(2) *R.* v. *Marton cum Grafton* (*Inhabitants*) (1847), 10 Q.B. 971 ; 33 Digest 451, *1632* ; 16 L.J.M.C. 159.

(3) *R.* v. *Sutton Coldfield Overseers* (1874), L.R. 9 Q.B. 153 ; 33 Digest 449, *1595* ; *sub nom. R.* v. *London & North Western Ry. Co.*, 43 L.J.M.C. 57 ; *sub nom. R.* v. *Sutton Coldfield, R.* v. *Aston*, 29 L.T. 840.

(4) *R.* v. *Southampton Licensing JJ., Ex p. Cardy*, [1906] 1 K.B. 446 ; 30 Digest 70, *552* ; 75 L.J.K.B. 295 ; 94 L.T. 437.

(5) *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630 ; 38 Digest 567, *1052* ; 67 L.J.Q.B. 643 ; 78 L.T. 758.

(6) *Robinson Bros.* (*Brewers*), *Ltd.* v. *Durham County Assessment Committee* (*Area No. 7*), [1938] A.C. 321 ; Digest Supp. ; 158 L.T. 498 ; *sub nom. Robinson Bros.* (*Brewers*), *Ltd.* v. *Houghton & Chester-le-Street Assessment Committee*, [1938] 2 All E.R. 79 ; 107 L.J.K.B. 369.

(7) *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee*, [1922] 1 K.B. 264 ; 38 Digest 581, *1157* ; 91 L.J.K.B. 258 ; 126 L.T. 338.

(8) *Gateshead Assessment Committee* v. *Redheugh Colliery, Ltd.*, [1925] A.C. 309 ; 38 Digest 604, *1309* ; 94 L.J.K.B. 258 ; 132 L.T. 583.

Appeal by way of case stated by the Norwich Rating Authority from a decision of the Recorder of Norwich, dated Feb. 20, 1940. The facts are fully set out in the judgment of the court delivered by Tucker, J.

Sydney G. Turner, K.C., and *Frederick Grant* for the appellants.

R. M. Montgomery, K.C., and *S. Gerald Howard* for the first respondents.

A. S. Comyns Carr, K.C., and *C. Erskine W. Simes* for the second respondent.

A preliminary objection to the hearing of this appeal was taken by the respondents on the ground that the court would not entertain a case stated by quarter sessions unless it was so stated that the court's answers to the case would finally dispose of the matter. It was contended that, if the appellants were successful, the matter would have to be remitted to quarter sessions for rehearing and that there was authority against such a course.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2), provides as follows:

> On the hearing of an appeal from the court of quarter sessions the appellate court may draw any inference of fact which might have been drawn in the court of quarter sessions, and may give any judgment or make any order which ought to have been given or made by that court, or may remit the order, and in criminal matters the conviction with the order, and the case stated on it, with the opinion or direction of the appellate court, for rehearing and determination by the court of quarter sessions, or may remit the case for restatement.

The following judgments were delivered on the preliminary objection.

Viscount Caldecote, L.C.J.: A preliminary objection to the hearing of this appeal by way of special case has been taken, and numerous cases have been cited to us in support of the objection. The objection was put upon the ground that the court has no jurisdiction to entertain an appeal by way of case stated unless one way or the other the decision upon the case stated will finally dispose of the questions between the parties. I have come to the conclusion on looking at the cases that this was never more than a question of practice, and it was not a question of the extent of the jurisdiction of the court. I think that the objection ought not to succeed.

The first case referred to was *R.* v. *Kesteven JJ.* (1). Lord Denman, C.J., who dealt with the point which has been raised, and for which the case is cited to us, said, at p. 819:

> It is satisfactory that we may now take it as universally known that, on cases sent from the sessions, the Court of Queen's Bench will not decide merely for the purpose of putting the inferior court in motion. To receive cases on which sessions only ask us whether they shall go forward or not is merely creating additional expense.

That seems to have been the ground which, at any rate, was in the mind of Lord Denman, C.J., when he gave his judgment. He did not say: "We have no jurisdiction."

When I come to *R.* v. *Marton cum Grafton* (*Inhabitants*) (2), again Lord Denman, C.J., adverted to this point. He said, at p. 975:

> We have repeatedly declared that we shall not act on such direction, but that the court below ought to hear and decide the appeal, subject to the opinion of this court on the point reserved, to avoid the wasteful expense of parish money in protracted litigation, and the very probable defeat of justice from the long delay which unavoidably attends it. We have had occasion to advert to such matters before: and this case affords a fit opportunity for declaring that we may find it absolutely necessary for the discharge of our other duties to decline answering cases thus improperly stated.

That last passage was quoted by BLACKBURN, J., in *R.* v. *Sutton Coldfield Overseers* (3). It will be seen that the headnote in that case is as follows:

> On an appeal against a poor-rate the sessions granted an application to enter and respite the appeal, subject to a case for the opinion of the Court of Queen's Bench; the reservation at the end of the case being, if the court should be of opinion that the Quarter Sessions ought not to have granted the application, the entry of the appeal is to be struck out:—HELD, that the point being raised on an order which did not finally dispose of the appeal the court would not entertain the case.

It is plain from that statement that the order from which the appeal was there being taken was one which did not dispose of the case, because the order was to respite the appeal. Therefore, it is material to observe that, when BLACKBURN, J., gave judgment, he said, at p. 155:

> But such cases have never been heard, except on a *certiorari* to bring up an order of sessions which, if unreversed, would finally decide the appeal.

Then he quotes the passage to which I have referred from *R.* v. *Marton cum Grafton* (*Inhabitants*) (2).

The last case to which our attention was called was one decided in 1906, and was not a rating case. It was *R.* v. *Southampton Licensing JJ., Ex p. Cardy* (4). In that case, LORD ALVERSTONE, L.C.J., referred to *R.* v. *Sutton Coldfield Overseers* (3), and said, at p. 449:

> . . . it has, I think, never been doubted that the Court of King's Bench will not entertain special cases where there will not be a final order, determining the matter, one way or the other, depending on the view they take of the special case.

As to whether or not that is fully consistent with the last sentence but one at p. 455, it is not necessary for me to express any opinion, but in this present case we are dealing with a case stated in pursuance of the Rating and Valuation Act, 1925, s. 31 (5), which provides that:

> . . . the court shall, unless it is of opinion that the application [for a case stated] is frivolous, state a case accordingly.

I am not going to say that in a case where, to use the expression of one of the judges in these cases, the court is being used as a committee of an inferior court to decide questions which arise in the course of the case, the court will then exercise its right, if it has the right, to hear those cases. In such a case, the court will arrive at a proper determination on those practical grounds which were adverted to by LORD DENMAN, C.J. However, in this present case, to which alone my observations are directed at the moment, we are asked to hear an appeal by way of case stated in pursuance of the directions contained in the Rating and Valuation Act, 1925, s. 31 (5). In these circumstances, and also in view of the power now conferred upon the court by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2), I have come to the conclusion, not only that we have power, but that we ought, to hear the appeal which is presented to us by the case which the recorder has stated. I think that the preliminary point fails.

TUCKER, J.: I agree. In this case, the recorder has made an order dismissing the rating authority's appeal. He came to that decision on the basis that the appellants' proposal was bad in law, but he none the less, in my view, decided the matter and came to a decision within the meaning of the Rating and Valuation Act, 1925, s. 31 (5), which provides as follows:

> On the determination of an appeal under this section any party to the appeal may, if dissatisfied with the decision of the court as being erroneous in point of law, make an application in writing at any time within 21 days after the date of the decision to have a case stated for the opinion of the High Court on the point of law, and the court shall, unless it is of opinion that the application is frivolous, state a case accordingly.

In my view, this case has been properly stated under the provisions of that subsection, and I take the view that, if the recorder had refused to state a case (this not being a frivolous application), an application could have been made to this court to compel him to state one. However that may be, I am satisfied that the case has been properly stated, and is one which he had power to state under that subsection, and it is to be observed that the Act of 1925 for the first time gave the right to a party to apply to compel a court of quarter sessions to state a case on a rating matter.

That being so, I think that it is clear that, that case having been properly stated under that section, the court has power, by reason of the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25, if it thinks fit and proper, to remit such a case for rehearing and to entertain such an appeal, notwithstanding the fact that the order which this court may make may be one which does not finally dispose of the matter.

I do not understand that we are in any way deciding anything which would tend to the view that it is not desirable, so far as it can be done, that, generally speaking, courts of quarter sessions should state cases in such a way that this court may be able to dispose of the matter finally. That is merely a matter of practice. I am satisfied that the court has jurisdiction to deal with this case stated in the way in which it is stated, but, of course, it has inherent power at any time to refuse to deal with a case if it has been stated either in an improper manner or at an improper stage of the proceedings. I agree that the preliminary objection fails.

Preliminary objection overruled.

Argument was then heard on the case stated and Tucker, J., delivered the following judgment of the court.

Tucker, J. [delivering the judgment of the court]: This is an appeal by way of case stated by the Recorder of Norwich under the Rating and Valuation Act, 1925. The respondent Fountain was at all material times the occupier of fully licensed premises in Norwich known as the Warwick Arms, which were let to him as a tied tenant by the owners, Bullard & Sons, Ltd., who are brewers. In the valuation list in force on Mar. 29, 1939, the Warwick Arms was assessed at £105 gross value and £84 rateable value, these figures being based upon a valuation made in 1934 for the purpose of the new valuation list then in preparation. This valuation had been made on the basis then generally recognised as correct, and was in accordance with the law as laid down in *Bradford-on-Avon Assessment Committee* v. *White* (5)—namely, that, in estimating the rent which a tenant of licensed premises might reasonably be expected to pay, the rent which brewers might give should be excluded as a factor to be taken into account.

On Mar. 17, 1938, *Robinson Bros.* (*Brewers*), *Ltd.* v. *Durham County Assessment Committee* (*Area No. 7*) (6) was decided by the House of Lords, with the result that *Bradford-on-Avon Assessment Committee* v. *White* (5) was overruled and it was laid down that the rent which a brewer may be prepared to pay is an element to be taken into consideration in estimating the rent payable by the hypothetical tenant. Accordingly, it became the duty of the rating authorities to take the necessary steps in proper cases to ensure that the assessments of licensed premises in their areas were in accord with the law as expounded in *Robinson's* case (6). With this object in view, the rating authority for Norwich (the present appellants) on Mar. 29, 1939, made a proposal pursuant to the Rating and Valuation Act, 1925, s. 37, for the amendment of the current valuation list in respect of the Warwick Arms, the proposed new values being £150 gross and £122 rateable. The proposal stated :

> The grounds or reasons in support of the above proposal are as follows: That the present assessment does not accord with the definition of gross value as interpreted by the House of Lords in the case of *Robinson Bros.* (*Brewers*), *Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* (6).

Numerous similar proposals were also served at the same time in respect of the other licensed premises in Norwich.

A notice of objection to the present proposal and to all the other proposals in respect of licensed properties owned, leased and/or occupied by Bullard & Sons, Ltd., was duly served on behalf of the respective occupiers and owners. The grounds of objection were stated as follows :

> (1) The said proposals are bad in law. (2) The proposed assessments are unfair, excessive and incorrect.

These proposals, including that in respect of the Warwick Arms, were heard by the assessment committee on July 11, 1939, and, by notice dated July 27, 1939, the committee gave notice that they rejected them. The rating authority duly gave notice of appeal to quarter sessions in respect of the committee's rejection of the proposal relating to the Warwick Arms, and the appeal was heard by the Recorder of Norwich on Feb. 20, 1940, when he dismissed the appeal and subsequently stated this case.

It is conceded that all the requisite procedural steps had at all stages been taken by the rating authority, and that the proposal was in proper form. None the less the appeal was dismissed without any evidence having been called on behalf of the rating authority. This decision was reached as a result of a submission made by counsel for the respondent assessment committee and the respondent Fountain, who were separately represented, and after a transcript of a shorthand note of the proceedings before the assessment committee had, with the consent of all parties, been read by the recorder.

An appeal to quarter sessions from a decision of an assessment committee is dealt with by way of hearing *de novo*, and, provided that the necessary procedural steps have been taken, the duty of the court is to hear all relevant and admissible evidence tendered on behalf of the appellant, unless some manifest irregularity is apparent which would justify the dismissal of the appeal without the evidence sought to be adduced by the appellant having been heard. In the present case, it appears from the case stated that the recorder arrived at his decision on the basis of the submission made on behalf of the respondents which is set out in para. 6 (1) (*a*), (*b*) and (*c*) of the case :

> It was contended on behalf of both respondents (1) That the first respondents were bound to reject the said proposal and I was bound to dismiss the appeal on the grounds (*a*) that the said proposal was supported by the valuation officer before the first-named respondents at their meeting on July 11, 1939, solely on the basis of the position of the Warwick Arms in 1934 and not the position in 1938 ; (*b*) that the said proposal was supported by the valuation officer before the first-named respondents at their meeting on July 11, 1939, solely on the ground of an arbitrary rule of thumb addition to the existing assessment ; they relied on the case of *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (7) ; (*c*) that the statement of the valuation officer set out in para. 3 (1) above afforded no relevant evidence in support of the said proposal as put forward before the first-named respondents at their meeting on July 11, 1939.

As his decision is based entirely on what took place before the assessment committee, as distinct from any evidence heard by him, it is necessary to consider the proceedings before the committee, a note of which is annexed to the case, in order to ascertain what there transpired which could have rendered the subsequent appeal incompetent.

As stated above, the notice of objection to the prososals in question had stated as one of the grounds of objection that the proposals were bad in law. It was accordingly arranged by the assessment committee with all parties concerned that at their meeting on July 11, 1939, this one ground of objection should be dealt with as a preliminary matter. At the meeting, counsel appeared on behalf of all occupiers concerned, and the valuation officer appeared in support of the proposals. At the outset it became apparent that counsel was not contending that the proposals were bad on their face, but was desirous, if possible, of eliciting from the valuation officer how the figures in the various proposals had been arrived at, in order to found thereon a submission that there was some illegality in the method adopted which would vitiate the proposals. The valuation officer insisted that he had not attended the meeting for the purpose of producing figures, but was there solely for the purpose of dealing with the objection that the proposals were bad in law, the onus of establishing which, he said, lay upon counsel for the occupiers. A discussion then ensued, in the course of which the valuation officer disclosed the basis upon which the proposed new values set out in the proposals had been arrived at—namely, by taking the barrelage for the years 1931 to 1933, which were the only figures available, and adding thereto a certain number of shillings per barrel, then deducting from the resulting figure the extra license duty and increased rates, and then allotting one-third of the residue as gross value and two-thirds as brewers' profit.

Having obtained this information, counsel for the occupiers then intimated to the committee that he had now got what he required for the purpose of his objection that the proposals were bad in law—namely, an admission that the proposed values stated therein had been arrived at by means of a percentage addition based on the trade for the years 1931 to 1933 without any individual valuation having been made of each separate hereditament, and, further, that the figures reflected the value as at 1934 instead of as at Apr. 1, 1938, which, he stated, was the material date.

It is by no means clear to us whether, in dealing with figures in response to the chairman's ruling or request that, notwithstanding the agreement as to the limited nature of the inquiry, he should amplify the figures in his proposals, the valuation officer was merely explaining these proposals or electing to proceed with the hearing of the proposals on their merits and waiving his right to apply for an adjournment, nor do we consider that it is material to any issue which we have to decide to come to any conclusion on this matter. It is, however, apparent that the valuation officer, who is not, of course, a trained legal advocate, was placed in a position of considerable difficulty, to which he had in no way himself contributed, and we do not think that it is right to apply to his conduct of his case at these informal proceedings the same standard as might be required of counsel in a court of law. In the result, the assessment committee rejected the proposals, including that in respect of the Warwick Arms.

It was on the basis of what had transpired before the assessment committee as outlined above that the recorder decided that he was bound to dismiss this appeal, relating solely to the Warwick Arms, without hearing any evidence.

His judgment is set out in the case and it is clear that he felt himself compelled to arrive at this conclusion as a result of *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (7). This was a case decided under the procedure in force prior to the Rating and Valuation Act, 1925, and it was there held that a supplemental valuation list, upon which a rate had been made, and which had been compiled by the rule-of-thumb process of making a fixed percentage addition to the existing assessments of a number of different hereditaments of the same class, was bad in law, as there had been no valuation of individual hereditaments, and, consequently, the rate based on such list was bad.

Assuming, without deciding, that the method adopted in making the supplemental list in *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (7) was identical with that whereby the proposals in respect of the licensed premises in Norwich had come into existence, we are of opinion that *Stirk's* case (7) has no application to the present case, which arises under the quite different procedure contained in the Rating and Valuation Act, 1925. By sect. 37 of that Act, the revision of current valuation lists is effected by means of proposals to amend such lists, and such proposals, unlike supplemental lists which have come into force and upon which a rate has been made, are of no effect unless and until they have been considered and adjudicated upon by the assessment committee. Until then, they are mere notices, which may or may not result in amendments in the list. It is the consequential amendments made after inquiry by the committee which produce the results affecting the occupiers and the rating authority. It is, accordingly, in our view, erroneous to say that a proposal which is in proper form and has been served within the appointed time on the proper persons can be bad in law for the reasons given in *Stirk's* case (7) so as to preclude either the assessment committee or a court of quarter sessions from hearing the evidence sought to be adduced in support thereof. Whether or not such evidence, when heard, may disclose that the amended value sought to be inserted in the list is incorrect for any one or more of a variety of different reasons is another question altogether. It is the duty of quarter sessions to hear the evidence and then decide whether it is such as will in law justify the amendment asked for in the proposal. We are satisfied that in the present case the proceedings before the assessment committee disclosed no ground in law for dismissing this appeal without evidence.

Counsel for the respondent Fountain has further contended that, in any event, the rating authority are tied down to the points taken before the assessment committee by the valuation officer, and that, as it appears that the calculations of that officer have proceeded on a wrong basis and that he has directed his valuation to the wrong date, the recorder could not allow any evidence to be given in support of the proposed values which proceeded on a different basis, and that for that reason also he was right in dismissing the appeal *in limine*, and that, although the recorder did not deal with this point in his judgment or in the case stated, none the less this court should not remit the case to him for rehearing, seeing that the only evidence which could be tendered before him would be similar to that which had been given before the assessment committee by the valuation officer.

The court is of opinion that there is no substance in this submission. It is true that, as has been stated in *Gateshead Assessment Committee* v. *Redheugh Colliery, Ltd.* (8), an appellant at quarter sessions may have so limited his claim to relief before the assessment committee that he is precluded from raising other and quite separate points on appeal. In this connection, however, it is important to observe that in that case it was held that the appellant had not so precluded himself, and it is helpful to see what was said by VISCOUNT CAVE, L.C., and LORD CARSON on the nature of the inquiry before an assessment committee. VISCOUNT CAVE, L.C., said, at pp. 318, 319 :

> I will add that in my opinion it is undesirable that a ratepayer who after an objection under sect. 1 of the Act of 1864 appeals to quarter sessions should be held closely to the points taken orally before the assessment committee. The proceedings on an objection are and were (I think) intended to be informal and inexpensive; and if objections were confined at quarter sessions to the precise points taken before the committee, it might be necessary for them in future to obtain legal aid and for the committee to take accurate notes of the proceedings. Upon the whole,
> A therefore, I am of opinion that this argument also fails.

In dealing with that matter, LORD CARSON used these words, at p. 335:

> That an objector is not bound to give evidence in support of his objection, that no oath can be administered, that there are no rules of evidence, all show that the committee is in no sense a court, and that the proceeding is an informal one with
> B a view to arresting the attention of the committee to save, if possible, the necessity of an appeal. Indeed, I think the very object of the section would be frustrated if at such a stage a party was obliged to employ legal advisers as to the exact points to be raised from fear he might, through any omission, be deprived of his right of appeal.

In the present case, there is only one point raised in the proposal—
C namely, that the existing assessment should be increased so as to give effect to the decision in *Robinson's* case (6). Subject to any question as to costs, that point may be supported at quarter sessions by evidence of quite a different nature from that adumbrated by the valuation officer before the assessment committee, but it remains the same point.
D Furthermore, the mere fact that the valuation officer directed his calculations to the wrong date will not preclude the rating authority from adducing evidence at quarter sessions directed to show the true value of the hereditament arrived at in accordance with *Robinson's* case (6) at the material date—namely, Mar. 29, 1939—after taking into considera-
E tion all the circumstances, including any countervailing matters tending to reduce or extinguish the increase which might otherwise result from the application of the principles laid down in that case. All such evidence, if relevant and otherwise admissible, should be received by the court of quarter sessions, notwithstanding that it may proceed on a different
F basis from that outlined to the assessment committee. For these reasons this appeal is allowed and the case will be remitted to the Recorder of Norwich for rehearing.

Appeal allowed. Case remitted to quarter sessions for rehearing. Costs of appeal to be paid by the second respondent. Leave to appeal.

G

Solicitors: *Sharpe, Pritchard & Co.*, agent for *Bernard Storey*, Town Clerk, Norwich (for the appellants); *Vizard, Oldham, Crowder & Cash*, agents for *Mills & Reeve*, Norwich (for the first respondents); *Godden, Holme & Ward*, agents for *Hill & Perks*, Norwich (for the second respon-
H dent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILLIAM BRIDGE, LTD. *v.* HARRISON.

[King's Bench Division (Viscount Caldecote, L.C.J., and Tucker, J.), **July 22, 23, 1941.**]

Weights and Measures—Special provisions—Coal—Byelaw—Provision of stamped weighing instrument on delivery vans—Weights and Measures Act, 1889 (*c.* 21), *s.* 28. A

The appellants, a firm of coal dealers, having sold a quantity of coal considerably in excess of 2 cwt. to a customer, arranged with a haulage contractor to deliver it. The contractor's vehicle was not provided with a weighing machine, and the appellants were charged with a breach of the following bye-law made by a county council under the B Weights and Measures Act, 1889, s. 28: "(8) Every coal dealer shall provide, and every person in charge of every vehicle carrying or bearing coal for sale or delivery shall constantly carry with such vehicle, a correct stamped weighing instrument of a form approved by the county council, together with duly verified weights or counterpoises." The appellants contended (i) that the byelaw was too uncertain; (ii) that the byelaw was unreasonable, as applying to vehicles carrying coal for C sale or delivery in bulk; (iii) that the byelaw must be construed *ejusdem generis* with byelaws 1-7 and did not apply to coal delivered in quantities exceeding 2 cwt.; (iv) that the byelaw did not apply to delivery by an agent or servant:—

Held: (i) the byelaw was not bad for uncertainty.

(ii) the proper interpretation to be placed upon the byelaw was that D it was not limited to deliveries in quantities not exceeding 2 cwt.

(iii) the byelaw applied to the delivery of coal by an agent or servant.

[**EDITORIAL NOTE.** Two objections were taken to the byelaw here in question. First, it was said that it was uncertain, because it only required the dealer to provide and the person in charge of the vehicle to carry a weighing instrument. It did not, E it was said, say when and in what circumstances it was to be provided or carried. For this reason it was said to be too indefinite and uncertain. Secondly, it was said that the byelaw was unreasonable, that is to say, that it was *ultra vires* and not authorised by the statute under which it was made. The basis of this argument was that the statute did not apply to coal carried in bulk and this argument was strengthened by the statement that weighing instruments had never been carried in such cases, and that, if they were carried, they would be useless, since they would F not accurately weigh loose coal carried in quantities of six or seven tons. Since both of these contentions are rejected, the first upon the construction of the byelaw and the second on the ground that it did not properly arise on the case, the effect of the decision would seem to be that it can be provided by a byelaw that, not only in the case of deliveries by a coal merchant himself, but also in the case of deliveries by haulage firms, provision shall be made for weighing the coal if required. G

As to Byelaws Affecting the Sale of Coal, see HALSBURY, Hailsham Edn., Vol. 33, p. 689, para. 1242; and for Cases, see DIGEST, Vol. 44, pp. 141, 142, Nos. 84-92.]

Cases referred to:

(1) *Kent County Council* v. *Humphrey*, [1895] 1 Q.B. 903; 44 Digest 141, *86* H
64 L.J.M.C. 190; 72 L.T. 563.

(2) *Alty* v. *Farrell*, [1896] 1 Q.B. 636; 44 Digest 141, *87*; 65 L.J.M.C. 115; 74 L.T. 492.

(3) *R.* v. *Turner* (1816), 5 M. & S. 206; 14 Digest 430, *4552*.

Appeal by way of case stated under the provisions of the Summary Jurisdiction Acts from a conviction by the magistrates of Birdforth in the North Riding of Yorkshire whereby they convicted the appellants of an offence against a local byelaw of being persons delivering coal from a vehicle by the hands of their agent or servant and failing to provide a correct stamped weighing instrument. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

E. Holroyd Pearce for the appellants.

Vernon R. M. Gattie for the respondent.

Holroyd Pearce: Byelaws 1-7 are applicable only to quantities of 2 cwt. or less. The Weights and Measures Act, 1889, s. 28 (*a*), empowering the local authority to make the byelaw, contains the only reference to the weight of the coal with which the section is dealing. The other paragraphs are connected with it in such a way that it is clear that the whole section is confined to small quantities. The byelaw is void for uncertainty, and it is unreasonable if construed to apply to quantities beyond the 2 cwt. referred to in sect. 28 (*a*). The coal was weighed on a weighbridge before leaving the appellants' premises. It is not economically possible to carry weighing machines when delivering coal in bulk, nor when the coal is carried loose can such machines be used for weighing the coal with any accuracy.

Gattie: The byelaw is not unreasonable. Under sect. 28 (*b*), there is ample power to make such a byelaw. [Counsel referred to *R.* v. *Turner* (3) as to proof of a negative]. The onus of proof is on the dealer to show that he has provided the machine required.

VISCOUNT CALDECOTE, L.C.J.: In this case, the facts of which are contained in a case stated by the justices for the North Riding of the County of York, the appellants were charged with:

> . . . being the persons delivering coal from a vehicle by the hand of their agent or servant John Sayer did fail to provide the said John Sayer with a correct stamped weighing instrument of a form approved by the county council.

That charge was brought against the appellants under a byelaw made by the North Riding County Council and approved by the Board of Trade in pursuance of powers contained in the Weights and Measures Act, 1889, s. 28. The byelaw is as follows:

> Every coal dealer shall provide, and every person in charge of every vehicle carrying or bearing coal for sale or delivery shall constantly carry with such vehicle, a correct stamped weighing instrument . . .

The section which authorises, or which is relied upon as authorising, that byelaw provides as follows:

> Any local authority may from time to time make, revoke, and alter byelaws (*a*) regulating for the purposes of this Act the sale of coal in quantities not exceeding 2 cwt.; and (*b*) requiring, either generally or in specified classes of cases, a weighing instrument, of a form approved by the local authority, to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.

The facts of the case are that a lorry containing both loose coal and coal in 1-cwt. sacks was delivering coal to a school. It was found that the lorry had no weighing machine on it, and thereupon the appellants, who were coal dealers, were charged with delivering coal from the vehicle and failing to provide Sayer, the man in charge of the vehicle, with a correct stamped weighing machine. The appellants did not give evidence when they were charged, but certain objections were taken which are set out in para. 8 of the case. The first is that the North Riding byelaw in question was intended to cover only coal delivered in quantities not exceeding 2 cwt., and what has been called the *ejusdem generis* principle is relied upon. I do not consider that to be a good point. Byelaw 8 might quite properly deal with coal other than that which was being delivered in quantities not exceeding 2 cwt., notwithstanding the fact that the earlier byelaws, 1 to 7, were dealing with coal in such quantities. The real point in the case is raised by the second argument for the appellants, which was that the byelaw in question governing the proceedings only states that the coal dealer is to provide a weighing instrument. The byelaw states that the person in charge of the vehicle carrying coal for sale or delivery is required to carry such an instrument, but the byelaw does not say when or in what circumstances such instrument should be provided by the coal dealer, and it is, therefore, too indefinite to be properly construed. The third point is that byelaw 8 does not apply to an agent or servant as does byelaw 7, nor does it apply to a haulage contractor under contract to deliver coal. The contention that the byelaw is too indefinite to be properly construed has been expanded in the present case into two submissions—namely, (i) that the byelaw is uncertain and too vague to be properly construed, and (ii) that it is unreasonable, as applying to vehicles carrying coal for sale or delivery in bulk.

Upon the argument submitted on behalf of the appellants, the magistrates were of opinion that the byelaws, including byelaw 8, were valid. The question submitted to us is whether they came to a correct determination and decision in point of law. Something very like this particular byelaw has been before the court in two cases to which we have been referred. The first was *Kent County Council* v. *Humphrey* (1). The byelaw in that case was in this form :

> Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine . . .

The point there taken before the magistrates was that the byelaw was invalid because it required that the carman should re-weigh the coal on being requested to do so, and the magistrates accepted that view and dismissed the information. On appeal on a case stated, the respondent did not appear, but counsel for the appellants argued that the byelaw was valid and that the justices ought to have convicted the respondent. According to the report, he argued only that point upon which the magistrates had based their view. However, CHARLES and WRIGHT, J.J., dealt with the validity of the byelaw in terms. CHARLES, J., said, at p. 905 :

> Acting under this section the appellants, the county council of Kent, have made a

byelaw which provides . . . That part of the byelaw is clearly valid, having regard to the provisions of sect. 28 to which I have called attention.

In 1896, another form of byelaw came before the Divisional Court in *Alty* v. *Farrell* (2). In that case there was a clause in the byelaw which provided that the person in charge of the vehicle must re-weigh the coal A upon being requested to do so by any constable, amongst other persons. It was argued for the appellant against a conviction that the byelaw was bad, on the ground that the requirement about the constable was unreasonable. LORD RUSSELL, L.C.J., in giving judgment, having gone through some of the foregoing provisions of the Weights and Measures B Act, 1889, dealt with the byelaw, and said, at p. 640 :

> The byelaw is divisible into two parts. The first part of it, requiring that a proper weighing instrument shall be carried by all vehicles carrying small quantities of coal for sale, has already been considered and has been held to be good in *Kent County Council* v. *Humphrey* (1).

C Then he proceeded to deal with the second part of the byelaw—namely, the provision requiring weighing on request. If it had not been for those two decisions, in terms giving the opinion of the court that this part of the byelaw which is in question here—requiring every coal dealer to provide a weighing instrument—was valid, I should have felt very great D doubt indeed as to whether the byelaw could be supported as being reasonable and certain. In the first place, it has been said—and I think that there is a good deal of argument in favour of the contention—that, as applying to coal in bulk, it is unreasonable. Similarly, as to certainty, it might be said that it is only by expanding the words of the byelaw and E framing them in different language altogether that one can arrive at the duty of the coal dealer. On the whole, however, after some little hesitation, I think that the byelaw must be held by us to be valid, whether attacked on the ground of unreasonableness or on that of uncertainty, because two courts which have had this part of the byelaw before them F have so held. It is true that the point which has been argued before us was not apparently argued in either of those cases, but there is the decision of the court that this part of the byelaw is valid, and I do not feel so clear about it that I am prepared to dissent or to express a contrary opinion and say that the byelaw is invalid.

G There are some other difficulties in the case, one of which is the form of the information. The information did not at all follow the provisions of the byelaw, but this may have been corrected in the course of the case by the conviction of the appellant. The information was in this form :

> . . . being the persons delivering coal by the hands of their agent or servant H did fail to provide [their servant] with a correct stamped weighing instrument.

On the whole, having regard to the fact that the appellants did not take the point according to the case and did not go into the box, I think that this point is not one which is left to us by the case which has been stated. The only question upon which the magistrates have stated a case is whether the byelaw in question is valid. I suggested a possible interpretation of the byelaw in the course of the argument. I suggested that it might be read as meaning that, when a vehicle carries coal for a coal dealer for sale or delivery, the coal dealer shall provide a weighing machine for that vehicle. I think that perhaps there is not so much difficulty as has been suggested in interpreting the byelaw, though it was clumsily drawn. I will confine my judgment to the one point upon which the case has been stated—namely, the validity of the byelaw. The magistrates submitted that question to us, and, for the reasons I have stated, I think that we cannot differ from the conclusion at which the magistrates have arrived.

Tucker, J.: This is a case stated by the justices of the petty sessional division of Birdforth in the North Riding of Yorkshire, and I think it is necessary in this case, as in every appeal to this court by way of case stated, to adhere strictly to the precise points of law raised and set out in the case. Several matters have been discussed and raised in the course of the argument in this case, some of which I have myself suggested, as to which I express no opinion at all, because, on looking at the case, I find that they are clearly not raised. In my view, the argument for the appellant as set out in the case is really confined to two points only. The first is the argument that, on a true construction of these byelaws, byelaw 8 ought to be held to apply only in cases where coal is delivered in quantities not exceeding 2 cwt. I think that, on a perusal of the byelaws, it is quite clear that such is not the proper interpretation to be put on byelaw 8, that it is in terms expressly worded for the purpose of extending to coal in general, and that it is not limited to deliveries in quantities not exceeding 2 cwt. The various points in the case for the appellants are set out in para. 8 of the case, and they number altogether six. I say nothing about Nos. 4, 5, and 6, because they do not raise contentions of law at all, in my view, and refer only to matters which are quite irrelevant. Nos. 2 and 3, chiefly No. 2, are the subclauses of that paragraph which raise what, in my view, is the real point, and the only point, which it is open to us to consider in this case, and that is as to whether or not this byelaw is too indefinite. That is the word used, and I think that that really confines counsel for the appellants to the argument that it is uncertain. I do not think that it is open to him to argue that this byelaw is *ultra vires* or unreasonable. I think that it confines him to his point of invalidity on the ground of uncertainty. Looking at the byelaw, I have come to the conclusion on the whole, not without some doubt, that it is not bad for uncertainty. It is quite true that the words are " Every coal dealer shall provide," but they must be construed in relation to the words which follow them, and I think that it is clear that it is imposing an obligation on the dealer to provide a weighing instrument only in cases where persons are carrying his coal for sale or delivery, whether they are carrying it under a contract or as his servant. I think that that is the proper and reasonable construction to put upon this byelaw, and it cannot be said to be invalid on the ground of uncertainty. For those reasons, I agree that this appeal fails.

Appeal dismissed with costs.

A Solicitors: *Ridsdale & Son*, agents for *Crombies & Wilkinsons*, York (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Hubert G. Thornley*, Northallerton (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BOARD OF EDUCATION FOR CITY OF WINDSOR *v.* FORD MOTOR CO. OF CANADA, LTD. AND OTHERS.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Atkin, Lord Thankerton,
D Lord Wright and Lord Porter), **June 23, 26, 27, July 30, 1941.**]

Privy Council—Canada—Education—Rate—Assessment for purposes of separate school—Company—Ascertainment of number of Roman Catholic shareholders—Ontario Separate Schools Act (R.S.O., 1937, *c.* 362), *s.* 66.

The legislation of Ontario provides for the assessment of both individuals and corporations in respect of rates for educational purposes. E In the absence of a notice by the person or corporation assessed these rates are applied for public education, but by the service of a proper notice a person or corporation may be assessed in respect of rates applied to the support of separate schools. In the case of corporations, the statutory requirement is that the corporation shall serve a notice requiring the whole or any part of the land which it occupies or the whole or any part of its business assessment to be entered rated and assessed for the pur- F poses of the separate school existing in the municipality making the assessment. Unless all the stock or shares of a corporation are held by Roman Catholics, the portion of such land and business to be assessed to the separate rate shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares. The respondent G company served such a notice requiring 18 per cent. of their total assessment to be assessed for separate school purposes. This figure, though arrived at in good faith, was not based on the actual number of Roman Catholic shareholders, but was only a guess or estimate of the proportion of its shares held by Roman Catholics:—

HELD: (i) the onus is on the corporation to establish by evidence H that the proportion stated in the notice does not bear a greater proportion to the whole of its assessment than the amount of stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

(ii) while the law did not require in such a case an exact figure, it did require the corporation to prove that the actual proportion was at least equal to the figure given with that measure of probability derived from ascertained facts which would entitle the judicial mind reasonably to infer the fact in issue.

[**EDITORIAL NOTE.** The legislation here considered requires a word or two of explanation. The Roman Catholic Church requires its adherents to send their children to Roman Catholic schools in all places where such schools are available. Such schools were originally provided by Roman Catholics at their own expense, and it was said to be unfair that they should also by means of an education rate be forced to provide a part of the cost of providing the schools established by the local authority, which schools, of course, their children, by the rules of the church, could not attend. This note is not concerned with the merits of this argument one way or the other, but is intended merely to show the position which the legislation here considered was designed to meet. The exemption of individuals from an education rate presented little difficulty, but the legislation went on to provide for the exemption of corporations so far as their stock or shares were held by Roman Catholics. In the case of small companies, the ascertainment of the religion of the shareholders is possibly a simple matter, but, in the case of large public companies with a world-wide shareholding, the ascertainment of any exact figure becomes practically impossible. The law, however, has never required exact proof. It is satisfied if such facts are proved as will entitle the judicial mind to infer the fact in issue. Applying that principle to the position of such a company, it would appear that the company must show that some of its shareholders are Roman Catholics and, having established this (and probably the further fact that many of its shareholders are persons resident in countries having a substantial Roman Catholic population) it will be able to add an additional percentage in respect of those shareholders thought to be Roman Catholics, though not definitely proved to be so. The governing factor is that, upon the facts proved, it is reasonable for the court to infer that at least the percentage claimed are Roman Catholics, but there must be evidence to support the inference.

As to Sufficiency of Proof, see HALSBURY, Hailsham Edn., Vol. 13, pp. 536, 537, para. 605 ; and for Cases, see DIGEST, Vol. 22, pp. 25-28, Nos. 55-71.]

Appeal by the Board of Education for the City of Windsor, Ontario, from a judgment of the Supreme Court of Canada, dated Oct. 30, 1939, who by a majority affirmed a unanimous decision of the Court of Appeal of Ontario, dated May 12, 1938, reversing a decision of the judge of the county court of the county of Essex, Ontario, dated Mar. 19, 1938, dismissing an appeal from the Court of Revision of the city of Windsor on a complaint by the present appellants against an assessment of the respondent company for separate school purposes. The facts are fully set out in the judgment of their Lordships delivered by Lord Atkin.

D. N. Pritt, K.C., and *N. L. Spencer* (Ontario Bar) for the appellants.

Frank Gahan for the first respondents, Ford Motor Co. of Canada, Ltd.

Frank Gahan and *J. A. Kennedy* (Ontario Bar) for the second respondents, the trustees of the separate schools.

Lord Atkin: This is an appeal from a judgment of the Supreme Court of Canada who by a majority affirmed a unanimous decision of the Court of Appeal of Ontario reversing a decision of the judge of the county court of the county of Essex, Ontario, dismissing an appeal from the Court of Revision of the city of Windsor on a complaint by the present appellants against an assessment of the respondent company for separate school purposes. The proceedings before the Court of Appeal arose on a case stated by the county court judge which raised specific questions of law. The judge's findings of fact are final. The dispute between the parties arises upon the statutory provisions made in Ontario for the raising of revenue for the purposes of education. Individuals and corporations alike are liable to be assessed and rated on their property in a municipality for educational purposes. In the absence of some action taken by the persons so assessed, they will be rated for public school purposes, but any individual liable to be assessed may claim to be assessed as a supporter of separate schools, which for the present purpose may be taken to mean Roman Catholic schools, in which case his property will be entered in a separate assessment roll, and he will then be rated by a board of trustees for such separate schools in accordance with the requirements of such board. However, it has been found desirable to extend this separation of assessments to the case of corporations who may include amongst their shareholders members who are Roman Catholics. The present statutory provision in this respect is found in the Ontario Separate Schools Act, s. 66, which provides as follows:

> (1) A corporation by notice (Form B) to the clerk of any municipality wherein a separate school exists may require the whole or any part of the land of which such corporation is either the owner and occupant, or not being the owner is the tenant, occupant or actual possessor, and the whole or any proportion of the business assessment or other assessments of such corporation made under the Assessment Act, to be entered, rated and assessed for the purposes of such separate school. (2) The assessor shall thereupon enter the corporation as a separate school supporter in the assessment roll in respect of the land and business or other assessments designated in the notice, and the proper entries shall be made in the prescribed column for separate school rates, and so much of the land and business or other assessments so designated shall be assessed accordingly for the purposes of the separate school and not for public school purposes, but all other land and the remainder, if any, of the business or other assessments of the corporation shall be separately entered and assessed for public school purposes. (3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares. (4) A notice given in pursuance of a resolution of the directors shall be sufficient and shall continue in force and be acted upon until it is withdrawn, varied or cancelled by a notice subsequently given pursuant to any resolution of the corporation or of its directors. (5) Every notice so given shall be kept by the clerk on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect an assessment roll. (6) The assessor shall in each year, before the return of the assessment roll, search for and examine all notices which may be so on file and shall follow and conform thereto and to the provisions of this Act, 1937, s. 57 (1).

The important question raised on the appeal is upon whom the onus rests of proving that the part of the company's assessment allocated by the company's notice to separate schools does not bear a greater proportion to the whole of the assessment than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares. In the present case, as found in the case stated, the Ford Motor Co. of Canada, Ltd., on July 27, 1937, passed a resolution to give the statutory notice requiring that 18 per cent. of its assessment in the city of Windsor be entered, rated and assessed for separate school purposes. The assessor acted on the notice, and the company were accordingly assessed in the roll of separate school supporters for 18 per cent. of their total assessment

—namely, $1,075,200 out of a total of $5,933,360. On Sept. 30, 1937, the board of education for the city of Windsor (the present appellants) appealed to the Court of Revision for the city against the assessments for separate school purposes of 23 companies, of whom the respondent company are one. The Court of Revision by a majority allowed the appeal, holding that not only was no effort made by the company to ascertain the number of shares held by Roman Catholics, but the corporation had no knowledge of the proportion of shares held by Roman Catholics. The present respondents appealed to the county court judge. He heard evidence on both sides, and in particular heard the evidence of Greig, the secretary of the company. It is unnecessary to repeat it. The judge found as a fact that the directors, in making the apportionment they did, acted in good faith, and with every desire to be fair, but that the division they made was not based on actual knowledge, but was only a guess or an estimate. There was ample evidence to sustain this finding of fact, but the substance of the judge's decision was that the appeal should be dismissed, on the ground that the appellants (the present respondents) had failed to prove before him affirmatively that the portion of the company's local assessment rated and assessed in support of separate schools pursuant to the resolution of the directors was no greater proportion of the whole of such assessments than the amount of the shares held by Roman Catholics bore to the whole amount of the shares, and that the onus of proving this affirmatively was on those parties defending the assessment. In stating the special case, the judge propounded the following questions for the opinion of the court:

> 1. Upon the facts above set out and upon the true construction of the statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the notice B, given by the corporation and the assessment, rating and enrolment made thereunder, the onus is upon the corporation to establish the fact that the share or proportion of its land, business or other assessments as set out in its requisition (Form B) does not bear a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares?
>
> 2. Upon the facts above set out and upon the true construction of the statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the notice B given by the corporation and the assessment, rating and enrolment made thereunder, the onus is not upon the ratepayer attacking the assessment to establish affirmatively the fact that the share or proportion of the corporation's land, business or other assessments as set out in its requisition (Form B) bears a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares?
>
> 3. Upon the facts above set out and upon the true construction of the statutes as applied to the facts so stated, was I right in holding that the appeals of Ford Motor Co. of Canada, Ltd., and of the board of trustees of the Roman Catholic separate schools for the city of Windsor, should be dismissed, the decision of the Court of Revision sustained and the notice, Form B, delivered by Ford Motor Co. of Canada, Ltd., set aside, vacated and declared null and void and of no effect and that all the assessments of the company in the city of Windsor be assessed, enrolled and rated for public school purposes, unless it was affirmatively proved before me that the share or proportion of the corporation's land, business or other assessment as set out in its requisition (Form B) did not bear a greater proportion to the whole of its assessment than the amount of the stock or shares held by Roman Catholics bore to the whole amount of the stock or shares?

The Court of Appeal of Ontario answered all three questions in the negative and allowed the appeal. The Supreme Court by a majority (Rinfret, Crocket and Kerwin, JJ.) dismissed the appeal to that court, agreeing that all three questions should be answered in the negative. Duff, C.J., and Davis, J., thought it only necessary to deal with the third question, which they would have answered in the affirmative, and, as a consequence, they would have allowed the appeal.

It is not, in their Lordships' opinion, possible to isolate the third question from the two preceding. Having formulated two general questions raising the issue of onus, the judge propounds a further question, the substance of which is whether, assuming that he was right in answering the two first questions in the affirmative, he was right in applying those answers to the present facts and holding that the company and the board of trustees had not affirmatively proved before him that the required apportionment was within the statute. Both Duff, C.J., and Davis, J., appear to decide that the onus is in fact on the company to support the validity of its notice, and, if this is right, there seems on good reason for not answering the first two questions in the same sense.

In dealing with the issues raised in the case, their Lordships have not derived much assistance from previous decisions or statutes dealing with similar topics but making different provisions, nor have they found it necessary to take into account the previous legislation in Ontario on the subject, with the short-lived change which was made in 1936. It seems the right course, in the circumstances, to confine themselves to the construction of the actual statute before them. Their Lordships have come to the conclusion that all three questions should be answered in the affirmative. It is common ground in all the judgments that the normal course of assessment and rating for educational purposes is that the ratepayer is rated for public schools purposes. A statutory exception is made in favour of separate schools, but, in order to avail themselves of the statutory protection, consisting of immunity from the ordinary liability and subjection to the extraordinary, the supporters of separate schools must establish their right to the statutory privilege. This appears the more obvious because, difficult as it may be to establish the facts defining the privilege, the facts, such as they are, are entirely within the knowledge, or means of knowledge, of those claiming the privilege, and not at all within the knowledge, or means of knowledge, of those responsible for the public schools. However, the difficulties, such as they are, are not as great as stated by the Court of Appeal and the majority of the Supreme Court, consideration of which seems to have influenced their final decision. Before 1913, a company in the statutory provisions corresponding to sect. 66 could only give a notice of apportionment which corresponded exactly to (" bore the same ratio " as the number of shares held by Roman Catholics bore to) the whole amount of shares in the company. This clearly involved ascertaining at some time the precise number of shares held by Roman Catholics, and, in the case of large companies, whose shares are held throughout the world, must have involved an impossible task. The present provision, as it has been since 1913, is that the required apportionment to separate schools must not be of a greater proportion than Roman Catholic shares bear to the total share capital. It is true that the statutory apportionment has still to be measured by a given ratio, and that the smaller figure must be ascertained in order to ensure that the statutory apportionment is no greater than it, but, under the present code, the smaller figure need by no means represent the exact figure of Roman Catholic shareholders. The total may be made larger. All that is required is proof that at least the smaller figure represents accurately a Roman Catholic shareholding. The company is not bound to apportion up to even a well-ascertained figure. They may decide to give less than the ascertained figure, and, without knowing what the precise numbers are, they may be able to know, and, if called on, to prove, that the minimum figure is at least x, and that their apportionment in favour of separate schools is no greater than x. There need be no difficulty in ascertaining this minimum figure. Some holdings may be known to be of Roman Catholics. These at least form a measure of the desired ratio. There may also be facts from which the reasonable inference is that some holdings in excess of those actually known would be of Roman Catholics, e.g., having ascertained 5 per cent., it may be easy to support an inference that at any rate there are, say, 2 per cent. more. In this connection, it must be remembered that we are within the realm of legal proof, which does not require certainty, but such a measure of probability derived from ascertained facts as to entitle the judicial mind reasonably to infer the fact in issue. With respect, therefore, it was inaccurate, as in the judgment of the Court of Appeal, to suggest that the contention of the Board of education assumed that it was a *sine qua non* that the companies should state positively and absolutely the exact percentage of their shareholders who were Roman Catholics, and, as in the judgment of KERWIN, J., to say that the construction of the statute suggested on behalf of the then appellants required the company to do the very same thing as in the legislation prior to 1913—namely, ascertain the precise ratio of the holdings of Roman Catholics. As has been pointed out, all that is required is that the company should prove at least a minimum figure of Roman Catholic holdings, and that the ratio required by the notice does not exceed the proportion of holdings measured by that figure. Two other matters raised in the excellent argument of counsel for the respondents require short notice. It was urged that the provisions of sect. 66 (4) have the effect of making the directors' notice valid unless at least it is proved to be invalid. This construction of the subsection, however, would lead to impossible results. The notice, says the subsection, is sufficient, and remains in force until withdrawn, varied or cancelled by another notice of the company. If this were literally construed, no appeal against an invalid notice would be of any avail until the directors chose to correct their mistake. However, the right of appeal is conceded, with the consequence that the notice may be found to be invalid for requiring too great a proportion. Subsect. (4) will not avail. The subsection can only affect the notice until challenged on appeal, and it appears to have no bearing on the question of onus on such appeal, which is determined by the considerations already stated.

The other question raised in argument was whether there existed any powers of amending an assessment by reference to the true ratio, when ascertained. The answer would appear to be that the apportionment must be the result of the company's own determination as provided by subsect. (1). It by no means follows that, if, for instance, the company decided upon a 15 per cent. apportionment, on the footing that 15 per cent. was the proportion of Roman Catholic shareholders, they would make an apportionment of 10 per cent. if that were discovered to be the true figure. They might or they might not. It would be for them to decide. The appeal tribunals could not make the necessary apportionment. The company would have to make a fresh apportionment and give a fresh notice. Whether this could be done in time to make an effective apportionment for the year of assessment in dispute was not discussed, and is not, therefore, considered.

The notice was struck at by DUFF, C.J., at an earlier stage than would appear to have been under discussion before the county court judge. He considered that the statute contemplated a notice only given after the company has ascertained as a fact that the apportionment is not greater than the apportionment defined by the statute, and that in the present case the company had not before them any substantial foundation for the conclusion of fact which was the essential condition of a valid notice. This makes the ascertainment by the company of the statutory proportion a condition precedent to the validity of their notice. It is an attractive proposition, and, like all opinions expressed by DUFF, C.J., demands careful consideration. It appears, however, to be weakened by the apparent concession at the end of the judgment that it would still be open to the company before the Revenue Court to establish that the statutory conditions did in fact exist, which brings us back again to the question of onus. On the whole, their Lordships feel bound to decide the case solely by reference to the question put in the special case. They will humbly advise His Majesty that the appeal be allowed, that the orders of the Court of Appeal be set aside, and that it be ordered that the answers to questions 1, 2 and 3 should be in the affirmative. The respondents must pay the costs of the appeals to the Court of Appeal and to the Supreme Court. As regards, however, the costs of the appeal to His Majesty in Council, in accordance with the terms of the order in council granting special leave to appeal, one set of the respondents' costs must be paid by the appellants.

Appeal allowed with costs except that one set of the respondents' costs in *accordance with the terms of the order in council giving special leave to appeal must be paid by the appellants.*

Solicitors: *Lawrence Jones & Co.* (for the appellants); *Blake & Redden* (for the respondents).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

GILLETTE INDUSTRIES, LTD. *v.* BERNSTEIN AND OTHERS.

[Court of Appeal (Lord Greene, M.R., and Clauson and du Parcq, L.JJ.), **July 24, 25, 1941.**]

Patents—Restrictive condition—Sale in violation of condition—Time when knowledge of condition essential—Certificate of validity—Practice as to grant of certificate of validity.

The respondents, who had purchased patented articles which were subject to a condition as to the price of resale, sold them at a price lower than that fixed by the condition. In an action for an injunction to restrain the respondents from selling the articles in breach of the condition, it was contended that it was sufficient that the respondents had become aware of the condition before the time of the resale. The appellants also asked for a certificate of validity of the patent:—

Held: (i) the relevant time at which it had to be shown that the respondents knew of the restrictive condition was the time of the acquisition of the goods.

(ii) a certificate of validity of a patent should not, save in exceptional cases, be granted, unless the validity of the patent has been thoroughly investigated by the court. In the present case there had been no such investigation, and the certificate should not be granted.

[**EDITORIAL NOTE.** In the first place this short case clears up a point arising upon a sentence in the judgment of Tomlin, J., in *Columbia Graphophone Co., Ltd.* v. *Thoms* (2). Some had construed that statement as authority for the proposition that the relevant time for knowledge of the restrictive condition was the time of resale. The Court of Appeal have here finally disposed of that contention. The second point dealt with is this. It would seem that the courts have in the past been a little lenient in granting certificates of validity. Here the Court of Appeal has stated quite plainly and finally that such certificates are not to be granted on mere *prima facie* evidence of validity, but only where the question of the validity of the patent has been fully investigated.

As to Certificate of Validity, see HALSBURY, Hailsham Edn., Vol. 24, pp. 693-695, paras. 1294, 1295; and for Cases, see DIGEST, Vol. 36, pp. 826-830, Nos. 3103-3149.]

Cases referred to:

(1) *National Phonograph Co. of Australia, Ltd.* v. *Menck*, [1911] A.C. 336; 36 Digest 679, *1590*; 80 L.J.P.C. 105; 104 L.T. 5.

(2) *Columbia Graphophone Co., Ltd.* v. *Thoms* (1924), 41 R.P.C. 294; 36 Digest 747, *2344*.

APPEAL by the plaintiffs from an order of BENNETT, J., dated May 8, 1941. The facts are fully set out in the judgment of LORD GREENE, M.R.

W. Trevor Watson, K.C., and *G. S. W. Marlow* (for *Basil Drewe*, on war service) for the appellants.

The respondents did not appear and were not represented.

LORD GREENE, M.R.: This is an appeal in three consolidated actions brought by Gillette Industries, Ltd., against three defendants, Bernstein, Albert and Solomon. In the court below, Bernstein appeared and submitted to judgment. The other two defendants, although they had put in defences, did not appear at the trial, and do not appear before us. In view of the consolidation, I will refer to the three actions as the action. The action was one to restrain the defendants from selling Gillette blades, manufactured by the plaintiffs under their patents, at less than certain regulated prices. The defences did not admit the acts complained of and disputed the validity of the patents, and there were counterclaims in the usual way.

In the cases of Albert and Solomon, the two who had not submitted to judgment, the judge refused the relief asked for by the plaintiffs, on the ground that the plaintiffs had not established that these defendants knew at the relevant time of the restrictive condition as to price. The first question in the appeal relates to that matter. The second question in the appeal arises from the refusal of the judge to grant a certificate of validity in respect of the patents, and that is a matter which can be dealt with separately from the first question.

The law relating to the obligation of purchasers in regard to patented articles where the patentee has imposed conditions as to the user of the article is, I think, for present purposes quite clear. Counsel for the appellants endeavoured to establish the proposition that knowledge of the restrictive condition at the time of the purchase by the defendant of the goods which he subsequently resold in the manner complained of was not essential. Without going into the authorities which have been cited to us, it seems to me to be established that, in order to succeed in a claim of this kind, the burden lies upon the patentee to show, in addition to other matters which have to be shown, that the defendant had the restrictive condition brought to his notice at the time when he acquired the goods, and that it is not sufficient to show that that condition came to his notice in the interval between his acquisition of the goods and his disposal of them. That appears to me to be the quite clear statement of the law to be extracted, not merely from the judgment of the Privy Council delivered by LORD SHAW in *National Phonograph Co. of Australia, Ltd.* v. *Menck* (1), but also from other earlier English authorities which are referred to in the judgment there. I do not propose to go into them. Not only is that matter now settled, but it also appears to me that knowledge at that moment of time must be the only relevant knowledge for this purpose, once the principle upon which a person acquiring a patented article is affected by restrictions of this kind is appreciated. I do not wish to say anything more on that subject, because I think it undesirable to endeavour to improve by language of my own the clear statements of the law by judges who have preceded me.

I must, however, mention *Columbia Graphophone Co., Ltd.* v. *Thoms* (2), a decision of Tomlin, J., referred to by counsel for the appellants as being some support for the proposition that the time of sale by the defendant is the relevant time. I am afraid I cannot find in the judgment of Tomlin, J., any particle of support for that view. The question in that case was a pure question of fact. The defendant went into the witness-box and was seen.

Tomlin, J., said :

> First the question of fact as to whether or not the defendant did, as alleged, sell records under the fixed prices with knowledge of the condition.

It is quite impossible to suppose that, when Tomlin, J., used that language, he was under the impression, or meaning to say, that the time of sale by the defendant was the relevant time for knowledge. It is quite obvious that that matter was not a matter which in that case became a relevant one, because I can have no doubt whatsoever that the judge was satisfied that knowledge at the time of acquisition had been established. I only refer to that argument because I think it desirable that any attempt to revive it in future cases in reliance upon that case should be stopped. This is no criticism of counsel for the appellants, who was quite right to call it to our attention.

The second point relates to the certificate of validity. In the case of Bernstein, who appeared and submitted to judgment, the judge refused the certificate of validity, and we cannot interfere with that. It is said in the other two cases that we can interfere, because we are allowing the appeal, and, therefore, are in a position ourselves to exercise the statutory jurisdiction. One difficulty in the way of that proposition stands out. Whether or not it be fatal I do not pause to decide, but the matter upon which the appellants have succeeded in this court has nothing to do with validity of the patent. The validity of the patent has not been a matter which has come before us or been debated in any way, nor would it have been relevant to the appeal. Quite apart from that, however, looking at the matter much more broadly, and assuming that we have jurisdiction to grant a certificate, I cannot see in this case that it is a jurisdiction which we ought to exercise. This was a case where the validity of the patents, although put in issue, was never really investigated by the court at all. The plaintiffs gave *prima facie* evidence of validity, as it is called, and on that the judge was invited to grant a certificate. I do not suggest for one moment that it may not be proper in suitable cases to grant a certificate of validity where the defendants do not appear and the matter is not thoroughly thrashed out. There may well be cases where the court can properly do that, but, in my judgment, in a case where the matter has not really been thoroughly gone into, the jurisdiction to grant certificates of validity should be exercised with great caution. Everyone who has been concerned with patent actions knows the difficulty of dealing with questions of validity unless there is adequate cross-examination of witnesses, adequate argument of any question which arises, and a close scrutiny of the true construction of various specifications. That being the common experience in most patent actions, if the court grants a certificate of validity when those matters have not been really gone into, it seems to me that it may be running the risk of affecting the public in future cases without really having sufficient material before it. Every case must depend on its own circumstances. However, the court certainly should not feel itself bound, as a matter of practice or custom, to grant a certificate of validity in a case where there has been no effective contest, merely on *prima facie* evidence of validity being given. I need put it no higher than that. In the present case, to come back to that, I can see no reason at all why a certificate of validity should be granted. The result, therefore, is that the appeal fails on that point, but succeeds on the first point.

CLAUSON, L.J.: I agree. On the first matter, I desire to say no more than that I am in complete agreement with LORD GREENE, M.R. As regards the question of validity, I cannot but be conscious of the fact that a rather loose practice has grown up among the judges of the Chancery Division of being somewhat too ready to grant certificates of validity, on *ex parte* evidence without cross-examination, where questions, which may often prove on investigation to be of very great difficulty, have not been thoroughly canvassed. I say that because I am conscious that there are probably many cases in the patent reports in which I myself have been guilty of just that looseness as to which we are now giving a warning. It is not easy, of course, for a judge of first instance to depart from a practice, even if he thinks that that practice is open to objections. With those observations of a personal character I wish to preface my statement that I agree entirely with what has been said by LORD GREENE, M.R. If I am right in the statement which I have made as to a certain looseness in practice having arisen, I hope that no one will base any criticism of what LORD GREENE, M.R., has said on any action of mine recorded in the patents reports.

DU PARCQ, L.J.: I agree with the order proposed by LORD GREENE, M.R., for the reasons which he gives.

Appeal allowed on first point and dismissed on second point.

Solicitors: *Bell, Broderick & Gray* (for the appellants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

LONDON CO-OPERATIVE SOCIETY, LTD. *v.* SOUTHERN ESSEX ASSESSMENT COMMITTEE.

[King's Bench Division (Viscount Caldecote, L.C.J., and Tucker, J.), **July 22, 1941.**]

Rates—Derating—Industrial hereditament—Canteen solely for use of employees—Factory and Workshop Act, 1901 (*c.* 22), *s.* 149 (4)—*Rating and Valuation* (*Apportionment*) *Act,* 1928 (*c.* 44), *s.* 3.

A laundry, which was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, used a part of its premises as a canteen. The laundry was about ¾ mile from the nearest town, and it was contended that the canteen was necessary for the welfare of the workers and the efficiency of the laundry and was, therefore, occupied for industrial purposes. The canteen was not run with a view to making a profit and the employees, who alone used the canteen, were treated in every way as customers at one of the society's retail shops. For this reason it was contended by the rating authority that the canteen was a retail shop and, as such, could not be a part of an industrial hereditament :—

Held : in the circumstances the canteen was not a place used solely for some purpose other than the manufacturing process or handicraft carried on in the laundry within the meaning of the Factory and Workshop Act, 1901, s. 149 (4), and was, therefore, part of the industrial hereditament.

[**EDITORIAL NOTE.** Viscount Caldecote, L.C.J., while limiting his decision to the precise facts of this case, suggests that up-to-date considerations of the equipment and lay-out of a factory include several things other than the rooms and machinery actually used for the manufacturing process or work there carried on. There is a tendency for the amenities of the modern factory to increase and, if all of them are to be rated as non-industrial parts of the hereditaments, it might constitute a serious check on welfare work which has shown good results in factories generally. It would appear from the judgment of Tucker, J., that the amenity, whatever it is, must be shown to be an essential and necessary part of the factory and that it cannot be brought within the terms of the Factory and Workshop Act, 1901, s. 149 (4), that is to say, it must be shown to be a place not used solely for some purpose other than the manufacturing process or handicraft carried on in the factory.

As to Industrial Hereditaments, see HALSBURY, Hailsham Edn., Vol. 27, pp. 439-455, paras. 876-886 ; and for Cases, see DIGEST, Supp., Rates and Rating, Nos. 226a-226ff.]

Cases referred to :

(1) *Moon* (*Lambeth Revenue Officer*) v. *London County Council, Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*), [1931] A.C. 151 ; Digest Supp. ; 100 L.J.K.B. 153 ; 144 L.T. 410.

(2) *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail, Ltd., Cardiff Revenue Officer* v. *Cardiff Assessment Committee and David Duncan & Sons, Ltd., Westminster Revenue Officer* v. *Daily Mirror Newspapers, Ltd.*, [1931] 1 K.B. 47 ; Digest Supp. ; 99 L.J.K.B. 672 ; 143 L.T. 500.

Appeal by way of case stated from a decision of the Essex Quarter Sessions.

The appellant society employed a staff of 180 (of which the majority were women) at their laundry, which was situated within the area of the respondent assessment committee. At this laundry they provided a canteen for their employees, considering it necessary for the welfare of the employees and the efficiency of the laundry. The laundry itself was situated about $\frac{3}{4}$ mile from the centre of the nearest town. A nearby public-house sold bread and cheese and similar snacks, but apart from that there was no restaurant or cafe nearer than those in the town itself. The laundry canteen consisted of two rooms with a kitchen between, and there were food display counters. The rooms were furnished with tables and chairs, one room being used by the women and the other by the men. All the food supplied by the canteen was supplied solely to those employed in the laundry, and purchases made in the canteen were treated as purchases in one of the shops of the appellant society. The society had no intention of running the canteen at a profit, and it was, in fact, run at a loss. On behalf of the society, it was contended that the canteen was occupied and used for industrial purposes, and that its net annual value should be apportioned accordingly. On behalf of the respondent assessment committee, it was contended that the canteen was used for purposes other than industrial purposes, and in particular for the purposes of a retail shop, and that the assessment appealed against was, therefore, the correct one. The appeals committee, accepting the contentions of the respondent assessment committee, dismissed the appeal, and the society appealed.

Harold B. Williams for the appellants.

A. H. Forbes for the respondents.

VISCOUNT CALDECOTE, L.C.J.: This is one of the cases which illustrate some of the minor difficulties of the legislation which dealt with the derating of industrial premises, and, in order to arrive at a decision, it is necessary to look a little carefully at the legislation. The Rating and Valuation (Apportionment) Act, 1928, by sect. 3 dealt with the question of the qualifying, to use the expression of LORD DUNEDIN, for inclusion in the category of industrial hereditament, and by the proviso to that section it was enacted that:

> . . . the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for . . . (*b*) the purposes of a retail shop . . .

In *Moon* (*Lambeth Revenue Officer*) v. *London County Council* (1), it has been quite clearly stated by LORD DUNEDIN, and must be treated as implicit in the decision in that case, that, if one hereditament is qualified as a factory or workshop by direct description, that part of the inquiry is ended.

One then comes to the provisions of sect. 4 of the same Act, which by subsect. (2) provides as to the entries in the valuation lists as to industrial hereditaments:

> For the purpose of determining in what proportions an industrial hereditament is occupied and used for industrial purposes and for other purposes respectively, the following provisions shall have effect: (*a*) The hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof

> is, under this Act or under the enactments relating to the regulation of mines . . . to be deemed neither to be, nor to form part of, a mine, factory, or workshop . . .

That provision takes one to the Factory and Workshop Act, 1901, which by sect. 149 (4) provides as follows:

> Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purpose of this Act.

In this case there is a place of refreshment, to use a term which is neither canteen nor messroom, for the persons employed in a place which is qualified as a factory or workshop. It is an industrial hereditament. The only persons who resort thereto are the persons who are employed by the appellants, and the case finds that the canteen is used:

> . . . solely for the purpose of supplying hot meals, light refreshments and hot and cold drinks, to workpeople engaged at the said laundry.

Taking that finding, and trying to apply sect. 149 (4) to those facts, I think that the question is whether this refreshment place, be it messroom or canteen, is solely used for some purpose other than that of a manufacturing process or handicraft. The rating appeal committee of quarter sessions for the county of Essex have found that it is solely used for some purpose other than that of the manufacturing process or handicraft carried on in the factory or workshop.

We have been referred to a passage in a judgment of Talbot, J., with which Avory, J., agreed, in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail, Ltd.* (2). The judge says that he does not intend to say, and that Avory, J., did not intend to say, that a messroom or a cookhouse necessarily came out of the industrial part of the building. Speaking for myself, I read messroom and cookhouse there as referring also to canteen. I see no distinction between the two. Then he goes on, at p. 78:

> Whether they do or not must [some of the reports say "may"] depend upon the persons for whose accommodation they are provided and used: according to whether they relate to the industrial part, the factory proper, if I may use the term, or to the clerical and editorial part of the hereditament.

That passage clearly suggests that, where there is an industrial part and a non-industrial part, the part to which the messing place is attached will determine the character of the messing place.

Here there is only one industrial part of this factory, apart from this canteen, so far as we are informed, and the view at which I have arrived, after some hesitation as to whether we should deal with this as a question of fact which has been arrived at on proper principles, is that the appeal committee were wrong, and, applying the principles of the judgment of Talbot, J., and applying what I may call the up-to-date considerations of the equipment and lay-out of a factory, I think that this is not a place which is solely used for some purpose other than that of a manufacturing process or handicraft. My view is limited, I need hardly say, to the precise facts of this case. It is useless to say that it is limited to a canteen. It may assist in the determination of the character of parts of a factory such as those which have been mentioned, a lavatory or a room where surgical first aid is provided, or a cloakroom, or a number of parts of the hereditament. If my decision is relevant to those cases on the facts, it will no doubt be applied, but, so far as the facts of this case are concerned, applying what I think are the principles laid down by AVORY and TALBOT, JJ., I think that the appeals committee came to a wrong decision, and that the appeal should be allowed.

TUCKER, J.: The difficulty which I have felt in this case is as to whether it is not a pure question of fact with regard to which it is difficult to say that quarter sessions have come to a wrong conclusion in law, but, on the whole, I agree that, on the facts as set out, this does raise a question of law, and that, on those facts, quarter sessions came to an erroneous decision. The element in the case which to my mind is decisive is that I think that the facts as stated really show that the canteen in this particular case was a necessary and essential feature of the premises for the welfare and efficiency of the workers engaged in the industrial part of the undertaking. It is quite true that the words in the case are that the appellants consider the canteen necessary for the welfare of the workers and that quarter sessions have not said that they consider it essential, but I think that that is really too narrow a view to be taken of those words. Having regard to the whole of the facts as set out, I think that it is apparent that in this particular case this canteen was an essential and necessary part of the factory where these people were working, and that, in those circumstances, it cannot be brought within the Factory and Workshop Act, 1901, s. 149 (4), and, unless it is brought within that subsection, it must form part of the industrial hereditament, and be treated as such. I therefore agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Fletcher, Liddle & Co.* (for the appellants); *Blundell, Baker & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

C. CZARNIKOW, LTD. *v.* JAVA SEA AND FIRE INSURANCE CO., LTD.

LESLIE & ANDERSON, LTD. *v.* JAVA SEA AND FIRE INSURANCE CO., LTD.

[King's Bench Division (Viscount Caldecote, L.C.J.), **April 3, 4, 7, 8, 9, July 30, 1941.**]

Insurance—Marine insurance—War risks—Ship sheltering in Italian port—Perishable cargo not transhipped or released—Constructive total loss—Marine Insurance Act, 1906 (*c.* 41), *s.* 60 (2) (i).

The plaintiffs were interested as buyers in a cargo of copra (a perishable cargo if detained in a hot climate for any length of time) loaded on a German ship which, just before the outbreak of war, put into Massawa, an Italian port. The cargo was insured under the usual form of policy with the defendants. Early in Oct., 1939, efforts were made to obtain the release and transhipment of the cargo, but both the captain of the vessel, acting apparently upon the instructions of the German owners, and the port authorities, who, although Italy was then a neutral country, were not disposed to help English interests, opposed such action, stating that transhipment could only be allowed where the destination was neutral. It was proved that on Oct. 11 the German captain was claiming to hold the cargo as prize, but that by Oct. 16 instructions had been issued by the German Foreign Office that the interests of the cargo were to be protected and that delivery or transhipment could not be refused. However, no conditions for release or transhipment were ever agreed. In 1941, the ship left Massawa and was captured by a British naval vessel. On Oct. 16, 1939, when the cargo had deteriorated, the plaintiffs gave notice of abandonment. The defendants refused to accept such notice and on Oct. 30, 1939, the plaintiffs issued the writ in this action claiming for a total loss. Further efforts were made after the issue of the writ for release of the cargoes, but, though at times these efforts seemed to be progressing favourably, they all ultimately broke down. It appeared that, on and after Aug. 25, 1939, German shipping was under the control of the German Government and that, if, after the ship had taken refuge in a neutral port, she had attempted to leave, she would most probably have been intercepted by English warships. It was found as a fact that the captain was bound to remain at Massawa until he received fresh instructions from the German Government :—

Held : there was a constructive total loss of the goods within the Marine Insurance Act, 1906, s. 60 (2) (i), since the plaintiffs had been deprived of their goods by a peril insured against.

[**EDITORIAL NOTE.** The present war has given rise to new questions on the subject of neutrality. It has in fact given a new meaning to the word "non-belligerency," which is now used for a form of neutrality—if it can be called such—more favourable to one belligerent than the other. Such changes necessarily affect the rights of parties interested in ships and their cargoes sheltering in neutral ports, and, in consequence, the liabilities of the insurers of those interests. The judgment herein discusses the position of an English cargo carried on a German-owned ship sheltering in an Italian port at a time when Italy was nominally neutral, but, in fact, determined to help Germany in every way possible. The position was further complicated by the fact that the German Government had given orders to the captains of its merchant vessels that they were to obey that Government's instructions and were in fact, both as to their ships and the cargoes on them, brought completely under government control. The questions which thus arise are necessarily to a large extent questions of fact, but involve the application of well-recognised principles of insurance law to this new state of facts. Where formerly there would have been a real prospect of the cargo being transhipped and eventually delivered to the buyers, there was here found to be so little possibility of that result being achieved that the cargo-owners succeeded in their claim for a constructive total loss.

As to War Risks, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-319, paras. 439-443; and for Cases, see DIGEST, Vol. 29, pp. 216-219, Nos. 1720-1758.]

A Cases referred to:

(1) *Atkinson* v. *Ritchie* (1809), 10 East, 530; 41 Digest 464, *2955*.

(2) *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1918] A.C. 101; 29 Digest 208, *1675*; 87 L.J.K.B. 69; 117 L.T. 609.

(3) *Polurrian S.S. Co., Ltd.* v. *Young*, [1915] 1 K.B. 922; 29 Digest 273, *2213*; 84 L.J.K.B. 1025; 112 L.T. 1053.

B (4) *Marstrand Fishing Co., Ltd.* v. *Beer*, [1937] 1 All E.R. 158; Digest Supp.; 156 L.T. 196.

Actions to recover under policies of marine insurance. The facts are fully set out in the judgment.

C *Cyril T. Miller* for the plaintiffs.

Patrick A. Devlin for the defendants.

Viscount Caldecote, L.C.J.: These two actions against the same defendants were tried together. I will, however, deal with the cases separately, and first with the action brought by Czarnikow, Ltd. The D plaintiffs, who are produce brokers, were fully interested in certain policies of marine insurance subscribed by the defendants. The policies were five in number, all dated Aug. 8, 1939, and all in the same form, and were upon 500 tons of copra loaded in the German steamship Oder, owned by the Norddeutscher Lloyd, for a voyage from Singapore to E Hamburg and Rotterdam. The insured perils included:

> . . . men of war . . . enemies . . . takings at sea . . . arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever . . . and of all other perils losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise.

F The f.c. and s. clause, which was part of the print of the form of policy used, had been struck out, but by cl. 1 of the Institute War Clauses, which were attached and formed part of the policy, the policy covered:

> . . . the risks excluded from the standard form of English marine policy [by the f.c. and s. clause].

G The facts as I find them were as follows. The plaintiffs, whose interest was admitted at the trial, were interested in the goods as buyers under c.i.f. contracts. The copra was shipped at Singapore on board the Oder on Aug. 8, 1939, and the Oder in due course proceeded on her voyage H to Hamburg and Rotterdam. On Aug. 20, the master of the Oder put into Massawa, and the Oder with her cargo was still there at the date of the issue of the writ—namely, Oct. 30. I was informed that some time in 1941 she left Massawa, but was intercepted by a British naval vessel. On Sept. 6, the master made a declaration reserving all his rights for the fact that his steamer, owing to imminent risks of war, and by order of the German Government, had interrupted its voyage to Port Said and had entered the port of Massawa in order to save the ship, cargo and crew from enemy confiscation. Early in October, efforts were made to investigate the position at Massawa. Miles, a representative of Messrs. Gellatly, Hankey & Co., Lloyds' agents at Khartoum, visited the port several times and made reports to his firm. On Oct. 4, he reported that the cargoes on board German ships there were still aboard and could not be discharged without the authority of the shipping lines. The captains stated definitely that there was no question of releasing cargo until they received express instructions to do so from their shipowners. The port commandant told Miles that his instructions were not to allow any operation by belligerent vessels in any circumstances, as Italy must remain neutral. The following day, Miles reported that the port commandant had received authority to permit transhipment of the cargoes only in those cases where the ports of shipment and of destination were neutral. During the period from Oct. 9 (up to which date it was illegal to make any payments to German nationals) to Nov. 24, an order of the Board of Trade was in force allowing an owner of cargo to make payments to the extent of freight and other necessary charges to obtain possession of the cargo. On Oct. 16, the plaintiffs gave notice of abandonment in respect of the parcels of copra in which they were interested on board the Oder, and of their intention to claim as for a total loss under the policies. On Oct. 18, the defendants cabled to the plaintiffs refusing to accept abandonment. The plaintiffs issued their writ in this action on Oct. 30, claiming for a total loss.

On Nov. 16, Miles, who had again visited Massawa, reported that the shipowners had given instructions to the captains to protect the interests of the cargo, and that, where perishable cargo was beginning to deteriorate, it must be sold to the best advantage, with the approval of the shipowners, and subject to consultation, if possible, with the owners of the goods. The same report contained a statement that instructions to this effect had been issued to various steamers in Massawa by the German consul at Addis Ababa on Oct. 16. Miles said that, as a result of these instructions, a copy of which had been sent to the port commandant, the position had entirely changed. The shipowners, whose sanction was still necessary for the discharge of any cargo, had stipulated terms on which they were willing to release it. These terms included, among others, a stipulation that the receiver of goods released should pay all freight to ultimate destination, as well as all transhipment and other expenses, and also a contribution of 20 per cent. of the value of the goods c.i.f. destination towards expenses of ship and crew at Massawa. Further, the obligations of the shipowners to the cargo or the bills of lading holders were to be understood to have ceased on arrival of the steamers at Massawa. On agreement to these terms by the bills of lading holder, and on payment of the percentage of contribution, the shipowners were prepared to instruct their captains to release the cargoes. According to Miles' information, the German consul at Addis Ababa, who had issued these instructions, took the view that bill of lading holders could not be refused delivery of their cargoes or the right to tranship. As a result, the Italian port authorities withdrew their objection to transhipment.

Nothing came of these proposals. Towards the end of November,
A the condition of the copra gave rise to proposals to sell the cargo. Meanwhile, the London Chamber of Commerce had been concerned to try to obtain release of this cargo, together with a number of other British-owned cargoes in the same position. On Nov. 24, they were authorised by the Board of Trade to pay freight and other necessary charges to,
B or for the benefit of, any enemy on behalf of the owner of any cargo in a ship lying at a port in any country not being enemy territory, for the purpose of obtaining possession of the cargo. At first success seemed likely to meet the efforts of the Chamber of Commerce, but a conference at Rotterdam of British shipowners and representatives of
C German shipping firms, which was attended by a representative of the German Foreign Office, broke up without any definite result being reached. In these circumstances, on Jan. 24, 1940, the plaintiffs applied to the Board of Trade for permission to pay the charges asked for by the German owners of 20 per cent. *ad valorem* on the goods, in addition to
D the bill of lading freight. Permission was refused on Feb. 3, in the absence of an agreement to be negotiated by the London Chamber of Commerce covering all British cargoes on enemy ships taking refuge in neutral ports. This was never attained. From Feb. 5, 1940, onwards, the order of Nov. 24, 1939, was revoked, and the London Chamber of
E Commerce were empowered to pay freight and other necessary charges to, or for the benefit of, any enemy on behalf of the owner of any cargo in a ship lying at a port in any country not being enemy territory up to 5 per cent. of the original c.i.f. invoice value of the cargo, for the purpose of obtaining possession of the cargo. This likewise led to no result,
F and in April the sale of the copra was further considered in order to avoid deterioration, though, from an analysis made on Dec. 9, showing that the rancidity of the copra had reached a stage where it was unsuitable for extraction of oil for industrial purposes, it seems certain that deterioration had already set in before April.

G The plaintiffs put their claim on the basis of a constructive total loss by arrest, restraint or detainment of princes and people, and they relied, not on loss of the adventure, but on the physical loss of the goods themselves. It was said by counsel for the plaintiffs that the loss occurred either when the ship put into Massawa on Aug. 28 or when the Italian
H port authorities refused to allow transhipment or at some time before Oct. 30, the date of the issue of the writ, by reason of the refusal of the captain, on the order of the German Government, to deliver the copra to the plaintiffs or their agents.

The first matter for my consideration is whether the captain, in taking the ship into Massawa on Aug. 28, was acting under the orders of the German Government. With a view to ascertaining the facts relevant to this and other questions, a joint letter was written to the Admiralty by the solicitors for the plaintiffs and for the defendants in which they asked whether the German Government at any time prior to the outbreak of war had taken control of German merchant shipping, and, if so, whether it had taken control by Aug. 26 or Aug. 28, 1939, and also whether, before either of those dates, the German Government had issued to German merchant vessels any orders which vessels in the locality of the Oder and Lichtenfels were likely to receive as to the action to be taken by such vessels in the event of war breaking out between Great Britain and Germany, and, if so, what the terms of the orders were. The letter further asked the Admiralty the following questions :

> (*c*) Whether, if either of these vessels had proceeded on her voyage instead of putting into Massawa she would, on and after the outbreak of war, have been in any, and if so what, degree of danger of capture by the allied naval forces ? (*d*) Whether, if after the outbreak of war, either of these vessels had attempted to leave Massawa and to return to Germany, she would have been in any, and if so what, degree of danger of capture by the allied naval forces ?

To this letter the Admiralty replied on Dec. 24, and, by consent of the parties, the letter was read as admissible evidence of the facts stated. The reply was in the following terms :

> My Lords do not feel able to give any precise answer to questions (*c*) and (*d*) as it is not possible to express in exact terms the degree of danger of interception or capture to which certain German ships would have been subjected, had they navigated openly on the high seas, instead of remaining in a friendly port. All that my Lords feel able to say is that if either of these ships had proceeded on her voyage instead of putting into Massawa or had left Massawa subsequent to the outbreak of war it is highly probable that she would have been intercepted by an allied warship. Whether she could have been seized as prize would have depended largely on circumstances, since experience leads us to suppose that the German crews would have made every effort to scuttle the ship.

A telephone inquiry by the solicitors for the plaintiffs elicited a further letter from the Admiralty on Jan. 14, 1941, as follows :

> (*a*) My Lords have information which indicates that German merchant shipping came completely under the control of the German Government on Aug. 25, 1939. This information is confidential ; its source cannot be divulged and my Lords are unable to authorise the use of it in any way which might lead to inquiry as to its origin. (*b*) My Lords have no information about the orders given by the German Government to German merchant vessels, but the fact that German merchant vessels in all parts of the world did proceed to or remain in neutral ports leaves little doubt that such orders were issued.

A copy of the letter was sent to the defendants' solicitors. This letter also was treated as admissible evidence. Although at the time when the Oder put into Massawa no state of war between Great Britain and Germany existed, there can be no doubt in my mind after reading the Admiralty letter of Jan. 14, 1941, that the German Government had already assumed the complete control of German merchant shipping. The Admiralty letter is couched in terms which may seem to leave the facts in some uncertainty, but I think that that is no more than the effect of the natural caution of the Admiralty in answering inquiries, and perhaps also of the circumlocution so often found in documents emanating from government departments. I read this letter as saying

that on or after Aug. 25 German merchant shipping was controlled by
the German Government. I also find that in putting into Massawa the
captain of the Oder was obeying the orders of the German Government.
It was contended by counsel for the defendants that there was no evidence
A that the captain ever ceased to be acting as bailee of the owners of the
cargo, and that, whether or not he acted in breach of his duty to them in
going into Massawa, he went there, not as an agent for the German
Government to seize the goods, but in order to see what his rights were.
This seems to me to be too simple a view to take of this German captain.
B In the account which he himself gave of his action, he relied on the order
of the German Government. No doubt the German Government, taking
stock of the political position on Aug. 28, formed a true estimate of the
risks likely to be run by a German ship proceeding on her way up the
Red Sea. They were certain to wish to prevent the seizure of this
C German ship, and into the bargain to lay their hands on the cargo and
prevent its reaching what, in a few days' time, would very likely be
enemy hands. I see no reason to disbelieve the captain's statement
in his protest that he acted under the order of the German Government.
It fits into the general statement contained in the Admiralty letter. It
D therefore seems to me to be the right inference from all the facts that the
German Government put their hands on this ship and cargo on Aug. 28,
when the captain took possession of the cargo as their agent. There
was in fact a restraint by princes or people.

It was argued that this was in any case only an "expected and contingent
E restraint" (see *Atkinson* v. *Ritchie* (1), at p. 534), and that the
captain was acting reasonably in the exercise of his commercial rights
stated in rr. 10, 14, 16, of the General Rules for Bills of Lading, which
were incorporated in the bill of lading for the copra. These contentions
seem to me to leave out of sight the critical fact of the control by the
F German Government of German merchant shipping. That fact once
having been proved, as I think it is, the action of the captain can only
reasonably, in my opinion, be ascribed to it. What the captain might
have done if he had not been under the order of the German Government
very possibly would not have differed very much, if at all, from what
G in fact he did, but the consequences would have been very different.
He would have been free at his own volition to stay at Massawa or to
proceed on the voyage, or even to discharge the cargo, whereas, once he
received his government's directions, he was bound to remain at Massawa,
there to await whatever fresh directions might reach him, as eventually
H they did, be it noticed, through the German consul at Addis Ababa. Higgs,
who, on behalf of the London Chamber of Commerce, dealt with these
and other detained British-owned cargoes, gave evidence of his abortive
efforts, and said that he realised throughout that he was negotiating
with the German Government as much as with the shipowners.

Having regard to my findings, it is unnecessary for me to discuss the
decision in *Becker, Gray & Co.* v. *London Assurance Corpn.* (2), which

was much relied on by the defendants' counsel. No doubt, if the captain's act was dictated by commercial prudence, the distinction drawn by Lord Sumner between a loss by perils insured against and a loss by avoiding them, between a loss by capture and a loss by the fear of it, would be directly in point. Applying, therefore, the language of the Marine Insurance Act, 1906, s. 60 (2) (i) to the facts as I find them, I think that the plaintiffs were deprived of the possession of their goods by a peril insured against.

The question then arises whether the circumstances were such as to justify the conclusion that there was a constructive total loss. The Marine Insurance Act, 1906, s. 60, declares that there is a constructive total loss where the subject-matter (in this case, the goods) is reasonably abandoned on account of its total loss appearing to be unavoidable. Subsect. (2) provides as follows:

> In particular there is a constructive total loss (i) Where the assured is deprived of the possession of his . . . goods by a peril insured against, and (*a*) it is unlikely that he can recover the . . . goods . . .

The proper approach to the question of fact which arises as the result of the last words quoted from subsect. (2) has been laid down in two cases. According to *Polurrian S.S. Co., Ltd.* v. *Young* (3) the assured must show that the balance of probability is that they cannot recover their goods within a reasonable time. In other words, they must show that it is more likely than unlikely. Kennedy, L.J., in his judgment, which was taken as the judgment of the court, also stated as indisputable the proposition that matters must be considered as they stood at the date of the commencement of the action. The second case is *Marstrand Shipping Co., Ltd.* v. *Beer* (4), where Porter, J., who, following *Polurrian S.S. Co., Ltd.* v. *Young* (3), took the material date to be that of the issue of the writ, said that the facts to be considered were the true facts as existing on that date, and not merely the facts as then known. I propose to apply these decisions in considering the question I have to decide. As far as the definition in subsect. (1) is concerned, I should again adopt the view held by Porter, J., that it is the true facts which have to be considered in deciding whether the subject-matter was reasonably abandoned on account of its actual total loss appearing to be inevitable. However, the view I have formed in applying the definition in subsect. (2) disposes of the question. The question is one which, as Kennedy, L.J., said in *Polurrian S.S. Co., Ltd.* v. *Young* (3), necessarily involves conjecture and speculation, and it is not altogether easy. There are some facts which stand out. On Oct. 30, the ship, with her cargo on board, had been at Massawa in a very hot climate for over two months. Worters, the plaintiffs' general manager, said that two months of the hot season would make the copra almost useless for human consumption, and, in his opinion, also for industrial use. Next, though Massawa was nominally a neutral port, in fact Italy, who did not come into the war till June, 1940, was, to use a phrase which with a new meaning has now become familiar, a non-belligerent. That is to say, she was one of the Axis powers and hand in glove with Germany, and not the least likely to do anything which the German Government did not wish. She was more likely than not to do all that was within her power, short of actual war at that stage, to hamper and cripple British cargo-owners as well as to support German activities. The reports made by Miles never held out any hope that either the German captain or the Italian port authorities were likely to be amenable to his efforts. On Oct. 11, the captains of German ships were taking up a position which, however fantastic, was at any rate significant. They maintained a right to hold all merchandise on board their ships as prize cargo. By this time, the attitude of the port commandant was, in Miles' words, " another difficulty to be overcome," and, in addition, the possibility of any acquiescence on the part of the ship-owners was reported to be " extremely remote." As against these facts, I was pressed particularly to say that, even assuming that the German Government ever seized the cargo, the seizure ended, and the goods were well on their way to release, on Oct. 16. At that date, the German consul issued instructions, which came from the German Foreign Office, to the effect that the interests of the cargo were to be protected, and that the cargo-owners could not be refused delivery, nor the right to tranship. Miles, writing on Nov. 16 from Massawa, thought this entirely changed the position, and the port commandant, who had no instructions from his government at Addis Ababa, showed a disposition to permit transhipment subject to the fulfilment of certain conditions. There is also the fact that the Board of Trade was taking an interest in the release of the cargoes at Massawa, and on Oct. 9 gave the licence to cargo-owners to make payments to that end which would otherwise have been illegal as trading with the enemy. Moreover, the London Chamber of Commerce was active, and on Oct. 25 held meetings of cargo-owners to discuss the general question of British cargoes detained on board German vessels taking refuge in neutral ports. At that time, anyone attending that meeting might perhaps have had his hopes raised by talk of the way in which the Chamber proposed to handle the release and reshipment of goods. It was evident, however, that this at best was going to be a long process, and anyone who was aware of the state of things at Massawa would, I think, have been over-optimistic if he had thought that the chances that the cargo would be recovered were then more than very slight. On the whole of the true facts as existing on Oct. 30, I find that on that date it was unlikely—that is to say, more unlikely than likely—that a cargo-owner could recover his goods. On these grounds, I find in favour of the plaintiffs' contention that there was a constructive total loss of the goods proximately caused by a peril insured against.

Counsel for the plaintiffs only faintly, if at all, relied on the alternative contention, at one time advanced by him, that the action of the Italian port authorities deprived the plaintiffs of their goods in circumstances which gave rise to a constructive total loss. On that view of the case, even if it was right, there are formidable objections based on the frustration clause (cl. 2) of the Institute War Clauses forming part of the policy, and on other provisions contained in cl. 2 relating to the duration of the insurance given by the policy. These questions were very fully argued before me, but, in view of the findings which I have already stated, they do not arise for my decision.

I now turn to the case of the Lichtenfels, with which I can deal shortly. She put into Massawa on Aug. 26 in precisely the same circumstances as the Oder, and for the same reason. She carried parcels of oilcake expeller, which had been bought by the second plaintiffs, who are also produce brokers, on c.i.f. terms. The evidence was that the oilcake was perishable and likely to deteriorate in the hold, and that within 12 months from stowage, which was on Aug. 12, it would become useless. It was still in the ship after the issue of the writ on Oct. 30. The oilcake was covered by policies of insurance in precisely the same terms as the policies in the first case. Notice of abandonment was given on Oct. 20, 1939, to the defendants' London agents. The rest of the facts relating to the Lichtenfels are identical in every material respect with those already stated with regard to the Oder. Accordingly, I find that there was a constructive total loss of the oilcake, and that these plaintiffs are entitled to recover under the policies. The parties have, I understand, agreed the sum to be paid by the defendants in the event of the plaintiffs succeeding in their claim. I give judgment for the first plaintiffs for £5,118 15*s*. and for the second plaintiffs for £2,055 17*s*. 9*d*.

Judgment for the plaintiffs in each case.

Solicitors: *Lawrance, Messer & Co.* (for the plaintiffs); *William A. Crump & Son* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* LORD GLENCONNER.

[KING'S BENCH DIVISION (Macnaghten, J.), **July 15, 16, 17, 1941.**]

Income Tax—Disposition in favour of children—Irrevocable on certain date—Settlement not revocable in circumstances existing at that date but possibly revocable later—Finance Act, 1936 (*c.* 34), *s.* 21 (10).

G., whose marriage had been dissolved, covenanted, in consideration of his wife making no application to the court for maintenance, to pay his wife during their joint lives an annuity of £1,000 per annum, and a further £750 per annum in respect of each of his two sons to be applied for the maintenance and education of such sons and to be payable during the joint lives of G. and such son. This covenant was entered into on Dec. 10, 1935. It was provided that, if either son should attain 23 years of age, or if, before either attained that age, the wife should die, then G. might, with the consent in writing of one of several named persons, by any deed or deeds revocable or irrevocable revoke one-half or less of the annuity of £750. Neither son had at the date of these proceedings attained the age of 23 years and the wife was still alive. It was contended that, as to one-half of £750 in the case of each son, this deed was not a settlement entered into before Apr. 22, 1936, "which immediately before that date was irrevocable," because those words meant "which immediately before that date could not in the circumstances then existing be revoked":—

HELD: upon the proper construction of the Finance Act, 1936, s. 21 (10), this was not a covenant which, as to one-half of the annuities of £750 in question, was immediately before Apr. 22, 1936, irrevocable. Therefore, as to one-half of such annuities, the payments were to be treated for the purposes of income tax as the income of G.

[**EDITORIAL NOTE.** This decision again concerns the severe restrictions placed upon the exemption from income tax formerly available by means of settlements upon infant children of the grantor. The point is a short one and it was contended that a settlement was irrevocable at a certain date if, in the circumstances then existing, it was impossible by reason of the terms of the settlement itself to revoke it. The court has held that this is not the meaning of the section, for the reason that the words of the enactment are plain, and, if that had been the intention of the legislature, it could easily have used words which would without doubt have had that meaning. The case is, therefore, one more unsuccessful attempt to find a breach in the drafting of this severe section.

AS TO DISPOSITIONS IN FAVOUR OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 268-270, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-575e.]

APPEAL by the Crown from a decision of the Commissioners for the Special Purposes of the Income Tax Acts. The facts are fully set out in the judgment.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellants.

F. Heyworth Talbot for the respondent.

MACNAGHTEN, J.: By a deed of covenant dated Dec. 10, 1935, made between Lord Glenconner of the one part and Lady Glenconner of the other part, after reciting the marriage of Lord and Lady Glenconner on Sept. 25, 1925, and that there had been issue of the marriage two children

—namely, Colin Christopher Paget Tennant, who was born on Dec. 1, 1926, and James Grey Tennant, who was born on Mar. 6, 1929—and further reciting that the marriage had been dissolved on Feb. 11, 1935, and that Lord and Lady Glenconner had agreed that, in consideration of Lady Glenconner making no application to the court for maintenance, Lord Glenconner would make the provision for Lady Glenconner and her children set out in the deed, Lord Glenconner covenanted during their joint lives to pay to Lady Glenconner an annuity of £1,000 per annum, and he further covenanted that, in respect of each of their two sons Colin Christopher Paget Tennant and James Grey Tennant, he would during the joint lives of himself and such son pay to Lady Glenconner an annuity of £750 to be applied for the maintenance, education or benefit, in such manner as Lady Glenconner should from time to time think proper, of the son. There was a proviso to the covenant that, if either son should attain the age of 23 years, or if, before either attained that age, Lady Glenconner should die, then Lord Glenconner might, on the happening of either of those events, or at any time thereafter, with the consent in writing of one of the several persons named or designated in the proviso :

> . . . by any deed or deeds revocable or irrevocable revoke or determine one-half or any less part [of the annuity of £750].

The Finance Act, 1936, s. 21 (1), provides as follows :

> Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person.

By subsect. (9) (*b*) of the same section it is provided as follows :

> In this section . . . the expression "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets.

Neither of the two sons has attained the age of 23 years, and Lady Glenconner is alive. In these circumstances, the Inland Revenue Commissioners claim that the one-half of the annuities of £750 payable in respect of each of the two sons must be treated for all the purposes of the Income Tax Acts as the income of Lord Glenconner, and not as the income of any other person. Sect. 21 (10) provides as follows :

> This section applies to every settlement wheresoever it was made or entered into, and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable.

It seems that Apr. 22, 1936, was the day on which the budget resolutions were introduced into the House of Commons.

The only question on this appeal is whether the deed of covenant dated Dec. 10, 1935, comes within the exception provided for in the Finance Act, 1936, s. 21 (10). A revocable settlement or covenant is a settlement or covenant which can be revoked at some future time. An irrevocable settlement or covenant is a settlement or covenant which can never be revoked. It is plain, therefore, that this covenant by Lord Glenconner was a revocable covenant as to one-half of the annuity of £750 provided for each of the two sons in either of the events specified in the proviso which I have read.

The contention raised on behalf of Lord Glenconner is that the true meaning of the exception is that a covenant made before Apr. 22, 1936, " which immediately before that date was irrevocable " means a covenant which immediately before Apr. 22 could not then be revoked. It is admitted that, if the words of the section had been " a settlement made or entered into before Apr. 22, 1936, which immediately before that date was an irrevocable settlement," the exception would be inapplicable and the appeal would succeed. In my view, that is what the words of the subsection taken in their natural sense do mean. If the legislature had intended that the exception should apply, not only to irrevocable settlements, but also to such revocable settlements as could not have been revoked " immediately before Apr. 22, 1936," it would have been quite easy to say so. The exception would have read thus : " except a settlement made or entered into before Apr. 22, 1936, which could not be revoked immediately before that date."

Some discussion was raised with regard to sect. 21 (8), but I do not think any assistance is to be gained in the present case from the provisions of that subsection. It appears to relate to cases where a settlement appears on the face of it to be irrevocable, and it provides that nevertheless it is to be deemed revocable in the circumstances set out in paras. (*a*), (*b*) and (*c*). The matter is somewhat further complicated by the proviso to the subsection, but I think that the meaning of the proviso is simply that the fact that an irrevocable settlement contains provisions which are described in the Trustee Act, 1925, s. 33, as " protective trusts " does not bring it within the scope of subsect. (8).

In my opinion, the appeal by the commissioners succeeds.

Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Hasties* (for the respondent).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

BISHOP *v.* BISHOP.

[Probate, Divorce and Admiralty Division (Langton, J.), **September 2, 1941.**]

Divorce—Petition—Form of petition—Separation order—Resumption of cohabitation—Matrimonial Causes Rules, 1937, *r.* 4 (1) (*f*).

A divorce petition was founded on alleged cruelty. There had been a separation order affecting the parties to the marriage and no resumption of cohabitation subsequent to the date of that order. The petition did not state whether there had been a resumption of cohabitation between the parties. It was contended that there was no obligation under the Matrimonial Causes Rules, 1937, r. 4 (1) (*f*), to plead that there had been no such resumption, since there was no obligation to plead a negative :—

Held : upon the proper construction of the rule, it was necessary to plead that there had been no resumption of cohabitation, the meaning of the rule being that the petitioner was required to state " whether or not " there had been such resumption.

[**EDITORIAL NOTE.** There can be little doubt that the intention of those who framed this rule was to provide the divorce court with information as to whether there had been a separation order which would interrupt the period of any alleged desertion. There is a presumption of law that a separation order made by a competent court has been complied with. It has, therefore, as a matter of practice in the Registry, been considered necessary to plead that a separation order has not been complied with and that the parties have resumed cohabitation. From time to time doubt has arisen whether there is any need to plead resumption or non-resumption of cohabitation where such a fact is irrelevant to the issue. On this summons, it was contended that there was no necessity to plead the absence of any resumption of cohabitation, since there is no obligation upon a party affirming to plead and prove a negative except where he is directed so to do by the rules of the court. There being a presumption of law that an order of a competent court pronouncing a decree of judicial separation has been complied with, the words " whether there has been any resumption of cohabitation since the making thereof " in the circumstances can only impose a duty of pleading an affirmative—namely, that there has been such resumption. It was argued that, therefore, there was no obligation upon a petitioner to plead that there has been no resumption of cohabitation if in fact there has been none. It was said that if it was necessary to plead the negative, the rule could have so provided by the use of the words " whether or not." The court, however, has not adopted this reasoning, but has treated the rule as requiring the matter to be pleaded in all cases.

As to Contents of Petition, see HALSBURY, Hailsham Edn., Vol. 10, pp. 693, 694, para. 1031 ; and for Cases, see DIGEST, Vol. 27, pp. 375-378, Nos. 3634-3670. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 2095-2098.]

Adjourned Summons asking that a certificate for setting down a petition for dissolution of marriage should be issued in the Registry. The question at issue was the proper construction of the Matrimonial Causes Rules, 1937, r. 4 (1) (*f*).

The Matrimonial Causes Rules, 1937, r. 4 (1) (*f*), provide as follows :

> The petition in a matrimonial cause (except in a suit of jactitation of marriage) shall state . . . (*f*) Whether there have been in the High Court or a court of summary jurisdiction any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, the date and effect of any

decree or order made in such proceedings, and whether there has been any resumption of cohabitation since the making thereof . . .

W. Latey for the petitioner.

LANGTON, J.: The word "whether" in the Matrimonial Causes Rules, 1937, r. 4 (1) (*f*), clearly means "aye or no." In the first sentence of r. 4 (1) (*f*), "whether" has such a meaning, and, accordingly, the same meaning must be attributed to it in the concluding sentence. The rule, therefore, lays down that the pleader shall plead under r. 4 (1) (*f*) and state whether or not there has been a resumption of cohabitation. The same applies to r. 4 (1) (*c*). It is desirable that the court should know precisely the state of affairs between the parties.

Solicitors: *Huntley, Son & Phillips*, agents for *Winch & Winch* Chatham (for the petitioner); *Stafford Clark & Co.* (for the respondent).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

BLACK AND BLACK *v.* MILEHAM.

[COURT OF APPEAL (MacKinnon, Clauson and Luxmoore, L.JJ.), **October 14, 1941.**]

Landlord and Tenant—War damage—Sufficiency of notice of disclaimer—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 4, 8.

The respondent was tenant of a flat which suffered damage by enemy action on Oct. 24, 1940. He negotiated with the appellants' agents to have the damage made good, but no repairs were done. On Nov. 14, 1940, he wrote a letter to the agents in the following terms: "Herewith the balance of keys for the above [flat]. The other keys are in the possession of the porter, Mr. Weaver, who has had charge of them for the past three months. As the flat has been uninhabitable since the 24th ult., I have not been in occupation. There still remains, however, property belonging to H.M. Post Office and the Gas Light and Coke Co. on the premises." It was contended that the letter was not a sufficient notice of disclaimer within the meaning of the Landlord and Tenant (War Damage) Act, 1939, s. 4:—

HELD: the letter was a sufficient notice of disclaimer.

[**EDITORIAL NOTE**. The point here is whether a notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939, requires to be in any particular form, and it is held that any written document showing an intention to disclaim is sufficient. Having regard to the circumstances and conditions in which such a notice generally has to be given, this is no doubt a wise and practical decision, but it has to be remembered that such a document may now have very far-reaching and important results. It will, on the one hand, divest the tenant and those claiming under him of all estate and interest in the premises and terminate the liabilities in respect of the lease, and, on the other, will revest in the landlord his former estate in the property (or so much thereof as remains). Now that, under the 1941 Act, these notices may apply to a ground lease with, perhaps, over 900 years to run, these are matters which should be the subject of some consideration and advice, and the execution of a purely informal document without advice may not be the wisest course for a tenant to take in such circumstances. If for these reasons the tenant should carefully consider his position, it is still more urgent that a mortgagee of leaseholds should do so. Upon a notice of disclaimer becoming effective, his security is extinguished by operation of the Landlord and Tenant (War Damage) Act, 1939, s. 8 (2) (*b*) (*c*). It would seem, too, that the only right of a mortgagee to receive a value payment or any part thereof under the War Damage Act, 1941, is under sect. 9 (4) of that Act, and that he only has a right to receive such a payment or part thereof if his mortgage is still subsisting at the time when the payment is made. It is, therefore, doubtful whether a mortgagee has any right to receive a value payment in respect of a disclaimed lease. Perhaps sect. 35 of the War Damage Act, 1941, operates to preserve his rights in such a case, but it is difficult to see how that section can override the clear words of sect. 9 (4). It would seem, rather, that the mortgagee is forced to take advantage of the Landlord and Tenant (War Damage) Act, 1939, s. 9 (3), a course which will not appeal to mortgagees in general. These matters do not arise out of the decision here reported, but it seems right that the difficulties arising upon a disclaimer should be stated, since, if they are known and appreciated, it may be possible to avoid them by construction or amendment of the statutes.

As to Notices of Disclaimer, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 987, 990, 991.]

Appeal by the plaintiffs from a judgment of His Honour Judge Engelbach sitting at the Westminster County Court on July 2, 1941.

The respondent was tenant of a flat which suffered damage by enemy action on Oct. 24, 1940. He negotiated with the appellants' agents to have the damage made good, but no repairs were done. On Nov. 14, 1940, he wrote a letter to the agents in the following terms:

> Herewith the balance of keys for the above [flat]. The other keys are in the possession of the porter, Mr. Weaver, who has had charge of them for the past three months. As the flat has been uninhabitable since the 24th ult., I have not been in occupation. There still remains, however, property belonging to H.M. Post Office and the Gas Light and Coke Co. on the premises.

The question was whether this letter was a sufficient notice of disclaimer within the Landlord and Tenant (War Damage) Act, 1939, s. 4.

J. Astell Burt for the appellants.

The respondent did not appear and was not represented.

MacKinnon, L.J.: In this case, the plaintiffs were the landlords of a flat in Vincent Square. At the beginning of Nov., 1940, the defendant was their tenant in that flat at a rent of £100 per annum and his share of the rates. On Mar. 14, 1941, the plaintiffs sued the defendant for one quarter's rent due on Dec. 25, 1940, and for half a year's rates. The defendant defended that claim. He did so by an amateur statement of defence, and it was apparently left to the judge to find out the real rights of the parties. When put into proper form, the defendant's defence was that as from Nov. 14, 1940, he was not liable for any rent or for any share of the rates because his lease had been terminated on Nov. 14.

That contention arose because of the provisions of the Landlord and Tenant (War Damage) Act, 1939. That Act provides in sect. 4 as follows :

> (1) Where the land comprised in a lease is unfit by reason of war damage . . .
> A (2) The tenant may serve on the landlord a notice (hereafter in this Act referred to as a notice of disclaimer) stating that he elects to disclaim the lease.

If, on receipt of that notice, a landlord does nothing, and does not adopt the alternative courses which are open to him under the Act, then, by sect. 8, notice of disclaimer having been served, and the landlord
B having done nothing, the lease disclaimed is deemed to have been surrendered, and the suggestion of the defendant, as it was interpreted with the assistance of the judge, was that by a notice of Nov. 14 he had elected to disclaim the lease. The landlords had done nothing and, therefore, by sect. 8, as from Nov. 14 the tenancy was at an end, and he
C was not liable for any rent.

There is no doubt that the defendant, the tenant, did send a letter to the agents of the landlords on Nov. 14, and the sole question is whether that letter constituted, within sect. 4 (2) (*a*) of the Act of 1939, a notice of disclaimer stating that he elected to disclaim the lease. In effect, the
D letter says : " I have given up possession of this flat. It is uninhabitable by reason of enemy action. I have given some of the keys to your porter. I enclose the rest of them. I have given up occupation." The agents, who received that letter, at any rate understood enough to say : " We are instructed to send the keys back, as our clients are not prepared to
E accept the surrender of the tenancy." Therefore, they understood that the letter amounted to a statement that the defendant was giving up, that is, surrendering, the tenancy.

The whole question is whether the county court judge was right in holding, as he did, that that letter of the defendant did amount to a
F sufficient notice under sect. 4 that he elected to disclaim the lease. The only provision in the Act in regard to the form of the notice is a provision in sect. 20 that it must be in writing. It was in writing, because it was a letter signed by the defendant. No other formality or scheme of words is required by the Act. It is sufficient if the tenant does in writing give
G notice to the landlord in some words or other that he elects to put an end to his tenancy, to disclaim his lease. I think that the county court judge was right in holding that, in the circumstances, this letter was a sufficient notice within that section, and that, therefore, the landlords not having taken the steps which were open to them under sect. 8 of the
H Act, the defendant was not liable for any rent after Nov. 14, 1940. That was what the county court judge held. He therefore gave judgment for the plaintiffs for £12 10*s*. in respect of rent up to Nov. 14, and a small amount for rates, but dismissed their claim for further rent after Nov. 14. The plaintiffs now appeal, and their counsel has said everything which it is possible to say upon the contention that the county court judge was wrong in holding that that was a sufficient notice of disclaimer within

sect. 4. I do not agree with that contention, for the reasons I have indicated, and I think that the appeal fails and must be dismissed.

Clauson, L.J.: I agree, for the reasons given by MacKinnon, L.J.

Luxmoore, L.J.: I also agree.

Appeal dismissed.

Solicitor: *C. A. Boulton* (for the appellants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[House of Lords (Viscount Simon, L.C., Viscount Sankey, Lord Russell of Killowen, Lord Wright and Lord Porter), **October 2, 3, 16, 1941.**]

Criminal Law—Felonious homicide—Provocation—Distinction between manslaughter and chance-medley.

Criminal Law—Murder—Direction to jury—Defence not asking for reduction of crime to manslaughter—Facts showing possible case of manslaughter.

On a trial for murder, the evidence was that F. and the accused were at enmity with one another, as the accused had taken steps to exclude F. from a bottle party. The evidence of the actual crime was that F. and the deceased, on entering a club, found the accused there and the accused came across to F. and seized him by the neck or the top of the coat. The deceased then went to F.'s aid, seized the accused and aimed a blow at him. The accused then whipped out his dagger, mortally wounded the deceased and cut F.'s hand severely. The accused in a statement to the police described his action as taken in self-defence, making no mention of any attack upon him by the deceased or of any knife being in the deceased's hand. Later, when the accused became aware that an open pocket-knife had been found lying beside the deceased, he amended his previous story, and his evidence at the trial was that the deceased had attacked him with an open pocket-knife and that he had heard someone say: "Let's knife him." The main case set up on behalf of the accused at the trial was self-defence, and this clearly failed, since the jury did not accept the accused's story. In his summing up, the trial judge did not use the word "provocation," but he did say that, if the jury, in the whole of the circumstances, thought that the blow might have been struck without any premeditation, and in the excitement of the disturbance, they might be justified in returning a verdict of manslaughter. It was contended that the summing up of the judge was inadequate:—

Held: (i) there was no evidence to justify a verdict of manslaughter.

(ii) the part of the summing up complained of was directed, not to a defence of manslaughter, there being no evidence of provocation, but to one of " chance-medley."

(iii) although an accused at the trial does not seek to show that the crime was one of manslaughter and not of murder, it is the duty of the judge in summing up, if the facts show any reasonable provocation, to direct the jury that they may bring in a verdict of manslaughter.

(iv) *Woolmington's* case (1) was a case where the defence to a charge of murder was that it was pure accident, and it does not lay down the principle that in every charge of murder, whatever the circumstances, the judge ought to direct the jury on the question of manslaughter. That duty arises only where there is material upon which a jury can properly find a verdict of manslaughter.

(v) there is no prescribed form of summing up in a trial for murder, and the decision in *R.* v. *Prince* (5) is not that any particular form of words must be used, but is that a reasonable doubt as to whether there was sufficient provocation to reduce the crime to manslaughter must be resolved in favour of the prisoner.

[**EDITORIAL NOTE.** The case of *R.* v. *Prince* (5) had raised some question as to the proper direction to the jury on a trial for murder. Having regard to the judgment in that case, it seemed a little difficult for a judge to avoid using a prescribed formula in his direction to the jury, and it was felt that this was contrary to the whole trend of previous decisions and to the practice in such cases. The decision in that case was based upon that in *Woolmington's* case (1), and, as the latter authority was again in question in the present case, it was felt that the moment was opportune to take the views of the House of Lords on the matters involved in these cases. In deciding the present case, the House has shown that there was really no evidence of provocation at all, and that, therefore, no question of manslaughter could arise, but Viscount Simon, L.C., has taken the opportunity to state in a clear and succinct manner the essential things to be proved on a defence of manslaughter. Turning to the general questions which were raised, it is shown that *Woolmington's* case (1) was dealing solely with the question of sufficiency of proof where the defence was that the killing was a pure accident, not, in the circumstances, amounting to criminal negligence. The difficulty which is there explored is the application to those circumstances of the principle that the prisoner is entitled to the benefit of the doubt. The explanation of *R.* v. *Prince* (5) is that that was a case where a doubt arose as to the sufficiency of proof of the provocation, and all that it decides is that, in proving provocation, the general rule applies that, if any doubt arises, it is to be resolved in favour of the prisoner. Beyond these matters there is another matter, which was referred to in *R.* v. *Hopper* (2). It is pointed out that, to avoid complication in placing the matter before the jury, counsel for the defence may decide to concentrate upon one particular line of defence. Thus, in the present case, the only defence relied upon by counsel at the trial was that of self-defence. The reduction of the crime to one of manslaughter was hardly mentioned in the address to the jury on behalf of the prisoner. It is held, however, in accordance with previous authority, that this would not exclude a reference to that matter in the summing up by the judge. If there is evidence which the jury can reasonably take into consideration as reducing the crime to one of manslaughter, then it is the duty of the judge to include in his summing up observations on the subject of manslaughter.

As to Manslaughter, see HALSBURY, Hailsham Edn., Vol. 9, pp. 438, 439, paras. 752, 753 ; and for Cases, see DIGEST, Vol. 15, pp. 776-782, Nos. 8305-8384.]

Cases referred to :

(1) *Woolmington* v. *Public Prosecutions Director*, [1935] A.C. 462 ; Digest Supp. 104 L.J.K.B. 433 ; 153 L.T. 232 ; 25 Cr. App. Rep. 72.

(2) *R.* v. *Hopper*, [1915] 2 K.B. 431 ; 14 Digest 298, *3146* ; 84 L.J.K.B. 1371 113 L.T. 381 ; 11 Cr. App. Rep. 136.

(3) *R.* v. *Lesbini*, [1914] 3 K.B. 1116; 15 Digest 779, *8332*; 84 L.J.K.B. 1102; 112 L.T. 175; 11 Cr. App. Rep. 7.

(4) *R.* v. *Schama, R.* v. *Abramovitch* (1914), 84 L.J.K.B. 396; 15 Digest 972, *10,865*; 112 L.T. 480; 11 Cr. App. Rep. 45.

(5) *R.* v. *Prince*, [1941] 3 All E.R. 37; Digest Supp.

Appeal by the prisoner in pursuance of a certificate by the Attorney-General, dated Sept. 11, 1941, from a decision of the Court of Criminal Appeal, dated Sept. 3, 1941, dismissing his appeal from a conviction of murder and sentence of death at a trial before Macnaghten, J., dated July 4, 1941, at the Central Criminal Court. The facts are fully set out in the opinion of Viscount Simon, L.C.

Hector Hughes, K.C., and *F. D. Levy* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *G. B. McClure* and *T. Christmas Humphreys* for the Crown.

Viscount Simon, L.C.: My Lords, on July 4, 1941, at the Central Criminal Court, the appellant, Antonio Mancini, was found guilty by the jury of the murder of Harry Distleman, and was sentenced to death by the presiding judge, Macnaghten, J. Mancini appealed, on the ground of misdirection, to the Court of Criminal Appeal, where there were two hearings. The first took place on Aug. 20, and, as a result, re-argument before a full court was ordered. The case was accordingly re-heard on Sept. 3 before Viscount Caldecote, L.C.J., and four other judges, when the appeal was dismissed. On Sept. 11, the Attorney-General, acting under the Criminal Appeal Act, 1907, s. 1 (6), gave his certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that, in his opinion, it was desirable in the public interest that a further appeal should be brought. Accordingly, the present appeal has come before this House. It is the third appeal on a conviction for murder to reach the House of Lords since the passing of the Criminal Appeal Act, 1907, thirty-four years ago.

Mancini was the manager of an enterprise called the Palm Beach Bottle Party, with premises in the basement of 37, Wardour Street. On the ground floor of that building were the quarters of a club, on which nothing turns, and on the first floor there was housed the West End Bridge and Billiards Club, of which Mancini was a member. Distleman was also a member of this club, and between 3 a.m. and 4 a.m. on May 1, when he and a number of other members (including a man named Fletcher and Mancini himself) were on the premises, he received a fatal wound in the left shoulder. A main artery was severed. The nature of the wound established that it must have been caused by an instrument with a two-edged blade, with a sharp point and sharp sides, at least 5 ins. long. Mancini at first told the police that he saw a dagger-knife on the floor and picked it up as Fletcher was advancing to strike him with a chair, but at the trial he admitted that he had such an instrument in his pocket—he described it as a knife about 7 ins. long—which he said he had bought some weeks previously because his life was threatened by gangs of roughs. He said that, in the course of fighting or struggling which took place among a number of persons present in the club, he was attacked by Distleman, when he drew the dagger from his pocket and struck out blindly, though without aiming at any particular individual. There had been an earlier violent altercation in the club when Mancini was not present, as the result of which Fletcher sustained head wounds and had to go with his friend Distleman to Charing Cross Hospital, where two stitches were put in. It was after this that he and Distleman returned to the club.

There was evidence that Fletcher was at enmity with Mancini, owing to the latter having at an earlier date taken steps to exclude Fletcher from the bottle party. When Fletcher and Distleman re entered the club and found Mancini there, Mancini, according to the evidence of the club doorkeeper, came across to Fletcher and seized him by the neck or top of the coat. Distleman went to Fletcher's aid, seized Mancini's shoulder or arm, and aimed a blow at him. It was at this point that Mancini whipped out his dagger and inflicted the fatal blow on Distleman, and a little later slashed Fletcher's hand so that he was severely cut. Distleman, mortally injured, made his way out of the room, but he collapsed at the foot of the stairs and died in a few minutes.

Mancini gave evidence that he threw his dagger away, and consequently this weapon was not forthcoming, but the police constable, who shortly afterwards came on the scene, found a small pocket-knife with its blade opened lying at the side of the dead Distleman in the doorway leading to the street. The pocket-knife was proved to have belonged to the dead man, but how it came to be lying open beside him at the bottom of the stairs was not explained. Shortly after these events Mancini decided to go to the police and make a statement, but at that time he was not aware of the discovery of Distleman's pocket-knife, and, while he described his own action as taken in self-defence, he made no mention whatever of a knife in Distleman's hand. Indeed, in his first statement to the police, he made no mention of any attack on him by Distleman at all. At the trial, however, after hearing the police evidence, he amended his previous story and declared that Distleman attacked him with the open penknife, and that, when coming up the stairs to enter the club, he had heard a voice behind him like Fletcher's saying "Let's knife him." No other witness saw any knife in Distleman's hand, or heard Fletcher's previous remark, though it would appear that some of these witnesses, if their statements were correct, should have done so.

The main case set up on behalf of the accused at the trial was self-defence, and the judge devoted the first portion of a very careful summing up to this question. Mancini's counsel found no fault with this part of the judge's charge at all. It was, in fact, if anything, too favourable to the accused, for MACNAGHTEN, J., did not invite the jury to consider whether, even if it were true that Mancini was menaced with the penknife, that would justify the use of Mancini's terrible weapon so as to constitute a case of necessary self-defence, nor did he make any observations on the question whether Mancini could not have escaped from the threatened danger by retreating from the club. The judge was content that the jury should deal with the question of self-defence on the basis A that, if they believed Mancini's story at the trial about Distleman advancing with the open penknife in his hand, they should return a verdict of not guilty. The jury's verdict shows that they disbelieved Mancini's story. Self-defence by the use of so deadly a weapon could not be made out if Mancini was never threatened with the penknife, and the judge B accordingly proceeded to charge the jury on the alternative view that, though, if Mancini was disbelieved, self-defence must be rejected, yet the circumstances might still justify the jury in returning a verdict of manslaughter rather than of murder. It is to a part of the judge's summing up on this topic that objection is taken, and it is contended for the C appellant that the language of Macnaghten, J., was not in accord with the law laid down by this House in *Woolmington* v. *Director of Public Prosecutions* (1).

Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence D which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending E counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it. Thus, in *R.* v. *Hopper* (2), at a F trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental, but Lord Reading, L.C.J., in delivering the judgment of the Court of Criminal Appeal, said, at p. 435:

> We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are G of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict H of murder cannot stand.

To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder where the accused pleads not guilty the judge must include in his summing up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder arises only when the evidence given before the

jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt as to whether this was or was not the case. Murder by secret poisoning, for example, does not give room
A for the defence that, owing to provocation received, the administration of the poison should be treated as manslaughter. On the other hand, if the defence to a charge of murder by poisoning was that the accused never administered the poison at all, the judge might very well be obliged to direct the jury on the alternative view that the administration was
B accidental, if the facts proved reasonably admitted this as a possible interpretation, even though the defence had not relied on the alternative.

In the present case, the appellant's counsel contended that the judge should have directed the jury as to what would amount to provocation sufficient to reduce the felonious act to manslaughter, and should have told
C them that, if they took the view that Mancini's act was provoked in this sense, they should acquit him of murder, and moreover that, if, without being satisfied on the point, they felt a reasonable doubt as to whether the act was or was not so provoked, Mancini was still entitled to be acquitted of murder and should be found guilty of manslaughter only.
D All this, however, depends on the view that there was evidence before the jury which might, if believed, be regarded as amounting to sufficient provocation. It is here, I think, that the contention for the appellant breaks down. It is not all provocation which will reduce the crime of murder to manslaughter. Provocation to have that result must be such
E as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. As it is said in STEPHEN'S DIGEST OF THE CRIMINAL LAW, art. 317:

> In deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's
> F conduct during that interval, and to all other circumstances tending to show the state of his mind.

The test to be applied is that of the effect of the provocation upon a reasonable man, as was laid down by the Court of Criminal Appeal in *R.* v. *Lesbini* (3), so that an unusually excitable or pugnacious individual
G is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (i) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (ii) to take into account the instrument with which the homicide was effected, for to retort in
H the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter.

Before, therefore, the summing up of MACNAGHTEN, J., can be criticised on the ground that it did not deal adequately with the topic of provocation, we have to see what was the extent of the provocation as disclosed by the evidence which the jury had to consider, and for this purpose we have to exclude altogether the allegation made by the prisoner that he heard the voice of Fletcher threatening him with " knifing," and that Distleman came at him with an open penknife in his hand. The judge had already instructed the jury fully on these matters and had directed the jury to acquit Mancini altogether if they felt that they could accept Mancini's story. The alternative case, therefore, as to which it is suggested that a defence of provocation was open, must be regarded on the basis that Mancini's story was rejected. In that view, the only knife used in the struggle was Mancini's dagger, and this followed Distleman's coming at him and aiming a blow with his hand or fist. Such action by Distleman would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was, therefore, on the assumption that Mancini's evidence was rejected, no adequate material to raise the issue of provocation. The judge, indeed, in his summing up never uses the word " provocation " as the ground on which a verdict of manslaughter might be based. The passage complained of in the summing up runs as follows :

> If you think that there was such a disturbance going on, unprovoked by him—he was not justified of course in using the dagger assuming you reject the plea of self-defence, that cannot be justified—but if in the whole of the circumstances, as far as you know them, having regard to the character of the people there, and the sort of conduct which was going on in such a place, you think that the blow may have been struck without any premeditation and in the excitement of the disturbance, whatever it was, it seems to me you might be justified in returning the verdict of manslaughter.

It seems probable that the judge in this passage was not referring to the defence of provocation, but rather had in mind the excuse which in the old books went by the name of " chance-medley " : see, for example, Blackstone, Book IV, p. 184. However the defence may be classified, the verdict should not, in my opinion, be upset on the ground of the above extract from the judge's charge. It was argued that the judge, instead of saying that the jury " might " be justified, should have told the jury that, if they thought that the blow might have been struck without any premeditation and in the excitement of the disturbance, they " should " return a verdict of manslaughter. Such an argument refines too much. The sentence must be read as a whole, and a conviction ought not necessarily to be quashed by picking a quarrel with a single word. I am satisfied that a jury would not be misled by the judge's phrasing, and the word " might " is to be explained by the preceding use of the word " may." In my opinion, moreover, there was not sufficient evidence (once the story of being attacked with the penknife was discarded) to justify a verdict of manslaughter arising from the use of the dagger.

As regards the more general question with which the Attorney-General asks the House to deal, I would formulate the following propositions.

(1) *Woolmington's* case (1) is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and consequently that, if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law. (The only exceptions arise, as explained in *Woolmington's* case (1), in the defence of insanity and in offences where onus of proof is specially dealt with by statute.) Thus, when a prisoner is charged with murder and felonious homicide is proved against him, if the jury, when considering the evidence as a whole at the conclusion of the case, are left in reasonable doubt as to whether the homicide proved is not manslaughter, they should return a verdict of manslaughter. *Woolmington's* case (1) was one in which the defence to the charge of murder was that of pure accident in circumstances not alleged to amount to criminal negligence. The prisoner gave evidence to that effect, and my noble and learned friend Lord Sankey lays it down, at p. 482 :

> . . . If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional . . . the prisoner is entitled to be acquitted.

A proposition to the same effect, but in different language, had been laid down by Lord Reading, L.C.J., in connection with a charge of receiving recently stolen goods in *R.* v. *Abramovitch* (4), at p. 49, and was approved in *Woolmington's* case(1). The law on this subject is thus finally established, and is, I think, perfectly clear.

(2) The language employed by Lord Sankey does not assert and does not imply that in every charge of murder, whatever the circumstances, the judge ought to devote part of his summing up to directing the jury on the question of manslaughter or the jury ought to consider it. If the evidence before the jury at the end of the case does not contain material upon which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing up that manslaughter is not dealt with. Taking, for example, a case in which no evidence which would raise the issue of provocation has been given, it is not the duty of the judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is upon the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it.

(3) There is no prescribed formula for summing up in a trial for murder, but the essential rules on this particular matter are as above stated. A good example of the proper direction is, as this House in *Woolmington's* case (1) pointed out, at p. 467, that of Finlay, J., at the abortive trial.

(4) Our attention was called to the recent decision of the Court of Criminal Appeal in *R.* v. *Prince* (5), where the court reduced the jury's

verdict of murder to manslaughter on the ground that the trial judge did not give a direction to the jury in accordance with the decision in *Woolmington's* case (1). *Prince's* case (5) was one in which the defence pleaded that there was provocation sufficient to reduce the charge to manslaughter. The Court of Criminal Appeal must have proceeded on the view that the jury were not adequately directed that reasonable doubt whether such provocation existed, as opposed to confident assurance that it did, was sufficient to require the milder view to be taken. There is no reason to repeat to the jury the warning as to reasonable doubt again and again, provided that the direction is plainly given.

(5) In *Woolmington's* case (1), at p. 482, the sentence already quoted, which ends " the prisoner is entitled to be acquitted," should, of course, be understood as meaning : " The prisoner is entitled to the benefit of the doubt." If the jury are left in reasonable doubt whether the act was " unintentional "—i.e., a pure accident without criminal negligence—the verdict should be not guilty. If they are left in reasonable doubt whether the act was " provoked "—i.e., perpetrated under the impulse of provocation as above defined—the prisoner should be found guilty of manslaughter.

My Lords, the House, in dealing with these unusual appeals in a criminal case, confines itself entirely to questions of law. The conclusion on the facts is for the jury, and the decision as to punishment rests elsewhere. There is no error of law in the summing up of Macnaghten, J. which would justify the House in allowing the appeal, and I therefore move that the appeal be dismissed.

Viscount Sankey : My Lords, I entirely agree.

Lord Russell of Killowen : My Lords, I also agree.

Lord Wright : My Lords, I also agree.

Lord Porter : My Lords, I concur in the reasoning of, and the result arrived at by, Viscount Simon, L.C.

Appeal dismissed.

Solicitors : *Addis, Edwards & Co.* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

The following is the judgment of the Court of Criminal Appeal (Viscount Caldecote, L.C.J., and Hawke, Humphreys, Hilbery and

TUCKER, JJ.), delivered by VISCOUNT CALDECOTE, L.C.J., on Sept. 3, 1941.

VISCOUNT CALDECOTE, L.C.J. [delivering the judgment of the court]: The appellant in this case was convicted at the Central Criminal Court on July 4,1941, of the murder of one Distleman. Distleman was stabbed with a knife, or, as it may be more properly described, a dagger, a two-bladed weapon some 7ins. or 8ins. long, and died almost immediately. The stabbing and the death occurred at the premises of a Wardour Street club. It was proved and not denied—that is to say, there was evidence which was not in question—that Mancini was the man who struck the blow. Fletcher was one of the witnesses who gave evidence on this point, and his evidence was that he had seen Mancini coming at him with a stiletto, or a blade, and that Mancini had previously pushed past him in the direction of Distleman. Mancini's own evidence was to the effect that he struck blows at both Distleman and Fletcher in self-defence. The applicant's own counsel stated in the course of the case that it was not contested, or would not be contested, that the blow was struck by Mancini. The defence was that the blow was struck in self-defence.

The story begins with incidents which took place some days before, on Apr. 20, 1941, the death having been caused in the early hours of May 1, 1941. There was a fight on Apr. 20 between Fletcher and one Connolly, who was the doorkeeper of a club or a bottle party held in the basement of these premises at Wardour Street. Mancini was the manager of the bottle party. The proprietor of the bottle party, a man one of whose names was Leon, told Mancini to exclude Fletcher from the premises of the bottle club. He himself also told Fletcher that he would be forbidden admission, and there was some evidence that Fletcher resented his exclusion. I think that counsel for the applicant said that his exclusion clearly resulted in bad blood between the various parties.

On Apr. 30, 1941, in the West End Club, on the first floor of these premises, there was a fight, in which Fletcher was injured. He was taken by Distleman and another man to the hospital, where his wounds received attention, and Distleman and Fletcher returned to the club some time in the early hours of May 1, at about 3 a.m., or 3.30 a.m. There was evidence that a man named Collette started hitting Fletcher with a billiard cue. Distleman is said to have been behind Fletcher. There was a good deal of evidence, which was not always the same, as to whether the two people, Collette and another man, Dimeo, and some others, were in the club premises before Fletcher returned. At any rate, Mancini was not there at the beginning of this struggle. Mancini's story was that he went up to the club, having come up from the bottle party, from which he had let out two men, to see what was the state of things, having been informed that there had been a brawl or fighting. He said that he was followed by Fletcher and another man and that he heard someone say;

> "Here is Baby [one of the names by which Mancini passed]. Let's knife him."

It was then said by Mancini in his evidence at the Central Criminal Court that Distleman and Fletcher attacked him, one of them with a billiard cue and the other with a knife, and that he then pulled the knife or the dagger from his pocket and struck out to defend himself. It should be said that this was not the same story which he had given in his statements to the police. He had previously said that he had picked up the knife, but, in his evidence at the trial, he said that he had carried a knife which one would buy in a shop, about 7ins. long, and having a sheath to it. He had the knife in his trouser-pocket. There was no doubt at all that, after Mancini came up to these premises and became engaged in a fight, he struck a blow which resulted in Distleman's death. Distleman died very quickly from the wound, which was a deep and a severe one on his left side.

In these circumstances, it is evident that there were three possible verdicts—namely, (i) a verdict of murder, (ii) a verdict of not guilty, on the ground that what Mancini did was done, and the blow which he struck was struck, in self-defence, and (iii) a verdict that he was guilty of the less serious crime of manslaughter, having struck the blow in the confusion of a brawl which was in process on these premises. As I have said, it was not disputed that the appellant caused the death of Distleman by stabbing him with a dagger, and that is a crime which is *prima facie* murder. The defence throughout this case, be it noted, was that the blow was struck in self-defence, and, if that was the true state of the facts, the accused was entitled to an acquittal. The circumstances provide a statutory defence under the Offences Against the Person Act, 1861.

The question, of course, which the jury had to consider on this question of self-defence which would justify a verdict of acquittal was dependent upon the evidence of the only witness other than the appellant who is said to have given evidence upon this question, one Crowley. I have referred to the evidence which Mancini himself gave as to the blow having been struck in self-defence, but Crowley is suggested as a witness who supported, or in some way confirmed, what Mancini, the applicant, said on this question. Crowley was not, as the judge suggested in his summing up, a very satisfactory witness. He was cautious, but he was also confused. In the course of his evidence, Crowley said that, when the row or the struggle started, Mancini was nearby—that is to say, a few yards away—and that how Mancini came to be in the fight at all was because he came across and grabbed hold of Fletcher. A little later on in his evidence, Crowley said that Distleman left Collette and went after Fletcher, and Mancini caught hold of Distleman's shoulder or arm and aimed a blow at him, and yet once more, in further cross-examination, he said that Mancini was the aggressor, and that Mancini came to Fletcher and caught hold of him by the throat. It seems to the court to be clear from these passages that Crowley is not a witness who supports the statements made by Mancini in his evidence to the effect that he struck a blow only in self-defence. In putting forward the defence of self-defence or provocation there was obviously great difficulty. There were two persons injured, the deceased man Distleman and Fletcher, and, on Mancini's evidence, the issue was self-defence or nothing. That, no doubt, was the explanation of counsel's statement, in answer to the judge, that self-defence was the answer which he would make to the charge, and was making on behalf of the applicant.

There was strong evidence which the jury might think contradicted the evidence of Mancini to the effect that the blows which he struck were in self-defence. Mancini had contradicted in his evidence the statements which he had made to the police. The evidence as to Distleman having come at him with a knife was produced for the first time at the trial, there having been no such suggestion previously in either of his statements to the police. The judge left this issue as to self-defence to the jury, with a full and complete statement of the evidence relevant to it. Having stated that Mancini's answer to the charge was that, although he struck the blow, he did it in self-defence, the judge went carefully and methodically through the evidence which Mancini gave, and then he told the jury:

> "It is quite true that where a person is attacked seriously, feloniously, and it is necessary for him for his own self-defence to use some lethal instrument, such as a pistol or a knife, and in using that instrument for defending himself against an attacker, he, intending merely to defend himself, inflicts a wound upon the person who is so attacking him which causes the death of that person, in such circumstances the law holds the act to be justifiable homicide and he is guiltless of any offence against the criminal law."

Later on, the judge dealt again with this question of self-defence, and he said that he dealt with it first because, if the jury accepted that plea, then their verdict should be not guilty on the indictment. In those circumstances, it seems to us to have been stated clearly and correctly to the jury that a verdict of not guilty must depend upon whether they accepted the evidence of Mancini as to Distleman having attacked him in the first place with the knife. The jury, in other words, could convict Mancini of murder only if they disbelieved completely the applicant's version of the occurrence.

These passages in the summing up of the judge are not criticised by counsel on behalf of the applicant. Indeed, counsel described these passages as unimpeachable, but their effect, he says, is destroyed by passages which occur later in the summing up, to which he addressed the greater part of his argument. The argument was that the appellant suggested as provocation precisely the same facts as those to which the judge had referred when he was dealing with the question of self-defence. It was said that the judge, so far from dealing with those facts as being relevant to the question of provocation, told the jury that, upon the assumption that they had rejected the plea of self-defence, there was no evidence as to how the blow which killed Distleman came to be struck, and none of the witnesses to whom the judge referred could speak to seeing the blow struck, that the judge omitted to tell the jury that they should return a verdict of manslaughter if they were left in doubt upon those facts which had been discussed in connection with the defence of self-defence, and that the judge was wrong, partly because he omitted to deal at all in terms with the defence of provocation and partly because he made an inaccurate statement of the law when he said:

> ". . . but, if, in the whole of the circumstances, as far as you know them, having regard to the character of the people there, and the sort of conduct which was going on in such a place, you think that the blow may have been struck without any premeditation and in the excitement of the disturbance, whatever it was, it seems to me you might be justified in returning the verdict of manslaughter."

It seems to us necessary to remember that provocation had not been suggested by the defence. The defence relied upon self-defence as involving an acquittal, and it was not discussed by counsel for the defence from the point of view of provocation.

It is said, however, that, on the authority of *R.* v. *Hopper* (2), it was the duty of the judge to deal specifically with the possibility that provocation led Mancini to strike the blow, in which case the proper verdict would have been one of manslaughter. In our judgment, the judge, having dealt with complete accuracy with the question of self-defence, was right in telling the jury, as he did, that there was no doubt that the killing of Distleman was unlawful, and that the question which they would then have to determine was whether the circumstances of the case were such that the verdict should be a verdict of manslaughter rather than one of murder. The manslaughter verdict was left to the jury in such general terms that they had the fullest opportunity of reducing the verdict to one of manslaughter if they had thought right, and, in our judgment, the judge was accurate in the way in which he dealt with the verdict of mansluaghter after he had put the relevant facts to the jury and dealt with them in connection with the defence of self-defence.

It is said that the passage which I have read, where the jury were told that, in a certain event, they might be justified in returning the verdict of manslaughter, is not conformable to the decision of the House of Lords and the opinion of VISCOUNT SANKEY, L.C., in *Woolmington* v. *Public Prosecutions Director* (1), and it is necessary to say one word upon that case. It seems to us that the opinion of VISCOUNT SANKEY, L.C., did no more than this. It disposed of the view that any unlawful killing was murder, and then it merely stated the familiar proposition that, if at the end of the case the jury was left with a reasonable doubt, they should resolve that doubt in favour of the prisoner, and this direction the judge twice gave to the jury in the clearest possible terms. At the beginning of his summing up, he said :

> "The Crown have got to satisfy the jury beyond reasonable doubt that the prisoner has committed the offence with which he is charged. If there is a reasonable doubt about the matter, such a doubt as you in your own affairs would act upon, if there is a reasonable doubt about the matter, as counsel for the Crown said, it should be resolved in favour of the accused. Where there is a reasonable doubt by our law the prisoner is entitled to a verdict of acquittal."

Again, immediately before the jury retired to consider their verdict, he repeated the statement :

> "Where you have a reasonable doubt about the matter, you should resolve that doubt in favour of the accused."

In the light of those two statements, it seems to us impossible to take objection to the statement of the judge :

> ". . . but, if, in the whole of the circumstances, as far as you know them, having regard to the character of the people there, and the sort of conduct which was going on in such a place, you think that the blow may have been struck without any premeditation and in the excitement of the disturbance, whatever it was, it seems to me you might be justified in returning the verdict of manslaughter."

Read in its natural sense, that is a direction to the jury which is open to no objection. It satisfies completely the statement of the law laid down by VISCOUNT SANKEY, L.C., and to treat *Woolmington's* case (1) as a decision which lays down that some particular form of words must be used to make a summing up accurate and complete would be to misunderstand and mis-apply the opinion of VISCOUNT SANKEY, L.C. In our view, the summing up was as favourable as possible, on the facts, perhaps in some respects too favourable, to the accused person. In our judgment, there was no misdirection adversely affecting the applicant, and the application must be refused.

Appeal dismissed.

Solicitors : *Registrar of Central Criminal Court* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re HARVEY, WESTMINSTER BANK, LTD. *v.* ASKWITH.

[Chancery Division (Bennett, J.), **October 15, 1941.**]

Trusts—Powers of trustees—Power to form blended fund—Similar residuary bequests in wills of two testatrices—Power of court—Trustee Act, 1925 (*c.* 19), *s.* 57.

Two testatrices, who were sisters, made identical residuary bequests to found a home for " needy, poor and aged persons of both sexes of genteel birth " to be called the T. H. Memorial Home. The trustee asked whether, on the true construction of the wills, he was entitled to blend the two trust funds into one fund for the foundation of one home, or whether he could be authorised to do so :—

Held : there was no power in the wills which would permit the trust funds to be so blended, but, under the powers given by the Trustee Act, 1925, s. 57, the trustee could be authorised by the court to do so.

[**EDITORIAL NOTE.** The court adopted what has been termed a benevolent jurisdiction in *Re New*, [1901] 2 Ch. 534 ; 43 Digest 840, *2866*. That jurisdiction was, however, very limited in character, and in the legislation of 1925 the court was given power to confer upon trustees generally or in any particular instance any power necessary in the management or administration of the trust property. As will be seen from the section set out in full below, the power is expressed in very wide terms, and it is here held to give the court power to blend into one fund the residuary estates under two wills where the trusts are expressed in precisely similar terms.

As to Departure from Terms of Trust, see HALSBURY, Hailsham Edn., Vol. 33, pp. 297-299, paras. 520, 521 ; and for Cases, see DIGEST, Vol. 43, pp. 839-841, Nos. 2857-2867.]

Adjourned Summons to determine, *inter alia*, whether two trust funds given by the residuary bequests of two testatrices respectively for identical purposes could be blended into one fund. The testatrix Alice Harvey made her will on Feb. 10, 1931. She died on Mar. 21, 1931, and her will was admitted to probate on July 6, 1931. By her will, she directed that her residuary estate should be held for the benefit of any home or homes founded by her or her sister Edith or for the foundation of a home " for needy poor and aged persons of both sexes of genteel birth who during their earlier life have not been able to earn a sufficient income adequate to provide for their old age," which home should be called the " Thirtle Harvey Memorial Home." Edith Harvey made her will on Mar. 15, 1932. She died on Sept. 19, 1936, and her will was admitted to probate on Dec. 24, 1936. She made a residuary bequest identical with that of her sister Alice. Neither sister founded any home during her life, and the Westminster Bank, Ltd., as the sole remaining trustee of both wills, took out a summons to determine, *inter alia*, whether, on the true construction of these wills, the residuary trust funds could be blended into one fund for the foundation of a single home for the purpose mentioned in the wills, to be called the Thirtle Harvey Memorial Home, or, if they could not, whether they could be authorised and empowered so to blend the two trust funds.

The Trustee Act, 1925, s. 57 (1), provides as follows :

Where in the management or administration of any property vested in trustees,

> any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

R. Goff for the plaintiff, the sole remaining trustee of both wills.

H. Lightman for the first defendant, a member of the managing committee of the Thirtle Harvey Memorial Home.

H. O. Danckwerts for the second defendant, the Attorney-General.

BENNETT, J.: I am not prepared to hold that the trustee of either will is entitled to blend his trust fund with that of the other will, as he has no power to do so under the will. Each testatrix seems to me to be desirous of establishing a separate home. Neither has said that her estate could be blended with that of her sister, and I do not think that, on the language used by either of them, the power is given to the trustee to blend the two estates. I think, however, that power is given to the court by the Trustee Act, 1925, s. 57, which enables me to give the necessary leave, and I think that the right way is to employ the powers of sect. 57 and to authorise the trustee of the will of Edith to blend his fund with the trust fund of Alice for the purpose of founding and maintaining one joint home, which is to be called the Thirtle Harvey Memorial Home, in accordance with the identical provisions in the two wills.

Order accordingly. Costs of all parties as between solicitor and client to come out of accumulated income of blended parts.

Solicitors: *J. J. Warden Gowing* (for the plaintiff and for the first defendant); *Treasury Solicitor* (for the second defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

CROCKER *v.* HADLEY.

[Court of Appeal (MacKinnon, Clauson and Luxmoore, L.JJ.), **October 13, 1941.**]

Interpleader—Interpleader in county courts—Appeal—Value of goods less than £20—Claim for damages for illegal distress—Leave to appeal—Necessity to apply to county court judge—County Courts Act, 1934 (*c.* 53), *s.* 105 (*c*) —*C.C.R., Ord.* 28, *r.* 11. A

The defendant obtained judgment against the appellant's husband for £9 18*s.* 6*d.*, and issued execution thereon. The goods levied were claimed by the appellant, the wife of the execution debtor, and the registrar issued an interpleader summons in respect of that issue. B The appellant added a claim, under C.C.R., Ord 28, r. 11, for damages for illegal distress. The claim was dismissed and no application was made for leave to appeal. The value of the goods was agreed to be £12 10*s.*:—

Held: the case came within the County Courts Act, 1934, s. 105 (*c*), and no appeal would lie without the leave of the county court judge. C In the circumstances the matter ought not to be referred back to the county court judge for leave to appeal.

[**EDITORIAL NOTE.** The real question at issue here is whether the claim for damages for illegal distress added to the interpleader proceedings proper was a separate proceeding or merely a part of the interpleader proceedings. The D matter was before the court under the repealed Act in *Lumb* v. *Teal & Co.* (1), and a somewhat similar point under the present section was decided in *West* v. *Automatic Salesman, Ltd.* (2). This, however, is the first time the precise point here in question has been decided under the existing legislation. The matter is of importance for the reason that it is here held that leave to appeal should have been obtained at the conclusion of the county court proceedings and that it was not a proper course to refer the matter back to the county court judge in order E that the omission might be repaired.

As to Appeal in Interpleader Proceedings, see HALSBURY, Hailsham Edn., Vol. 18, p. 661, paras. 1136-1140; and for Cases, see DIGEST, Vol. 29, pp. 510, 511, Nos. 613, 614.]

Cases referred to: F

(1) *Lumb* v. *Teal & Co.* (1889), 22 Q.B.D. 675; 29 Digest 510, *614*; 58 L.J.Q.B. 298; 60 L.T. 451.

(2) *West* v. *Automatic Salesman, Ltd.*, [1937] 2 K.B. 398; [1937] 2 All E.R. 706; Digest Supp.; 106 L.J.K.B. 769; 157 L.T. 539.

Appeal by the plaintiff from an order of His Honour Judge Topham, G K.C., sitting at the Portsmouth County Court on May 15, 1941. The facts are fully set out in the judgment of MacKinnon, L.J., but the matter is decided upon a preliminary objection that no leave to appeal had been obtained.

G. O. Slade for the appellant. H

B. Stewart Horner for the first respondent, the execution creditor.

J. Scott Henderson for the second respondent, the registrar of the Portsmouth County Court.

MacKinnon, L.J.: This is an appeal from the judgment of the judge of the Portsmouth County Court, and the notice of appeal says:

> . . . that this court will be moved for an order that so much of the judgment of the county court judge as related to the plaintiff's claim for damages for trespass, wrongful and illegal distress and for conversion and for detinue whereby it was ordered that judgment be entered for the defendants with costs to be taxed on Scale C and paid by the plaintiff may be reversed.

Counsel for the second respondent raised a preliminary objection to the hearing of the appeal by reason of the fact that the leave of the county court judge to appeal was not obtained. Such leave was not asked for and was not granted, and, therefore, it is contended that no appeal is permissible. Counsel relies upon the County Courts Act, 1934, s. 105 (*c*), which provides that, without leave of the judge, there shall be no appeal

> . . . in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed or the proceeds thereof, does not exceed £20.

It is admitted in this case that the value of the goods claimed amounted to only £12 10*s*., being, therefore, less than £20. If, as it appears to be on those facts, this is an appeal in interpleader proceedings with regard to goods the value of which was less than £20, there is manifestly no ground for hearing the appeal.

Counsel for the appellant contends that the matter does not come within sect. 105 (*c*), because these were not proceedings in interpleader. That depends upon the nature of the proceedings. The County Courts Act, 1934, s. 133 (1) provides as follows:

> If a claim is made to or in respect of any goods or chattels seized in execution under process of a county court, or in respect of the proceeds or value thereof, the registrar may, as well before as after any action brought against him, issue a summons calling before the court the party at whose instance the process issued and the party making the claim.

By C.C.R., Ord. 28, r. 11, it is provided as follows:

> Where in the interpleader proceedings the claimant claims damages from the execution creditor or from the registrar in respect of the seizure of the goods, he shall, in the particulars of his claim to the goods, state the amount he claims for damages . . .

This was originally an action by Hadley against Crocker, against whom he had recovered judgment. Hadley proceeded to request or instruct the bailiff of the county court to issue execution on the goods in the house in which Crocker lived. The bailiff seized some goods there, and then Mrs. Crocker, the wife, put in a claim for the goods as being her property. Therefore, the county court registrar issued a summons to the judgment creditor and to Mrs. Crocker under sect. 133, calling upon them to interplead as regards these goods, and incidentally giving Mrs. Crocker an opportunity of putting her claim under C.C.R., Ord. 28, r. 11, for damages in respect of seizure, which she did. The county court judge heard those proceedings—and I think they were clearly proceedings by way of interpleader—decided against Mrs. Crocker, and dismissed her claim for damages, incidentally stating that, if he had given her any damages, they would have amounted to one farthing. It is against that decision and the dismissal of Mrs. Crocker's claim for damages that this appeal is brought.

I am satisfied that this matter comes within sect. 105 of the Act, being an appeal in the interpleader proceedings. It is admitted that the value of the goods claimed did not amount to £20, and, therefore, it was necessary for the judge, in those circumstances, to grant leave to appeal. Since no such leave was granted, this appeal is not in order. In fact, precisely the same point was decided as long ago as 1889, under the equivalent provisions A of the County Courts Act, 1888, in *Lumb* v. *Teal & Co.* (1). Counsel for the appellant asks us to say that that case was wrongly decided. I think that it was not. It was quite rightly decided. I am told by Luxmoore, L.J., that the same point was decided much more recently in this court in *West* v. *Automatic Salesman, Ltd.* (2). However, it is not necessary B to refer to the authorities, because I think that, without doing so, this appeal must be dismissed, by reason of the objection taken to it by counsel for the second respondent.

Counsel for the appellant also asks us to refer the matter back to the county court judge in order to obtain his leave to appeal. In my C opinion, that would be a most unwarrantable procedure. It would impose upon the county court judge the necessity of trying to remember the details of a case heard last May, and, it would be very unfortunate if we were to give an opportunity for him to be troubled in that way.

D

Clauson, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal dismissed with costs.

E

Solicitors: *Lucien Fior* (for the appellant); *H. H. Payne*, Registrar of Portsmouth County Court (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re A DEBTOR (No. 6 OF 1934), *Ex parte* OFFICIAL RECEIVER.

[CHANCERY DIVISION (Morton, J.), **October 20, 1941**.]

Bankruptcy—Appropriation of salary—Order continuing appropriation after discharge of bankrupt—Validity—Bankruptcy Act, 1914 (*c.* 59), *s.* 51.

By an order dated Mar. 1, 1938, under the Bankruptcy Act, 1914, s. 51 (1), a bankrupt was ordered to pay £5 per month out of his salary to the trustee " during the bankruptcy " and " until the court shall make an order to the contrary." On Mar. 10, 1938, the court granted the bankrupt an immediate discharge, but directed that the order of Mar. 1, 1938, should be " expressly continued." On a special case stated, the court was asked to determine whether that part of the order of discharge expressly continuing the payment was valid and effective :—

HELD : the bankruptcy did not terminate with the discharge of the bankrupt, and the terms in the order of discharge expressly continuing the payment under the order of Mar. 1, 1938, were, therefore, valid and effective.

[**EDITORIAL NOTE.** This was a test case to test the validity of orders requiring payments by the bankrupt to be continued after the discharge of the bankrupt. The argument against the validity of such orders was that, on their proper construction, the words " during the bankruptcy " in such an order were governed by their context and must be read as " during the bankruptcy whilst the bankrupt remains undischarged." It was agreed by all that the discharge of the bankrupt did not terminate the bankruptcy, though it has never been settled, nor does this case finally determine, the precise definition of the termination of the bankruptcy. It is, however, decided that the doubt as to the validity of the orders here in question is ill-founded. This doubt has existed since 1891, and was stressed in a judgment by Mr. Registrar PARTON in 1938. A later stage of the proceedings before Mr. Registrar PARTON came before the Court of Appeal in 1939, and the views then expressed, though, as the question was not in issue, they could not decide the matter, went some way to confirm the validity of such orders. Basing himself on the views of the Court of Appeal, MORTON, J., has herein held that orders of this nature are valid.

AS TO APPROPRIATION OF SALARIES, see HALSBURY, Hailsham Edn., Vol. 2, pp. 253, 254, para. 328 ; and FOR CASES, see DIGEST, Vol. 4, pp. 738, 739, Nos. 6380-6389.]

Cases referred to :

(1) *Re Gold, Ex p. Gold* (1891), 8 Morr. 45 ; 4 Digest 574, *5279*.

(2) *Re A Debtor* (*No. 946 of 1926*), July 6, 1938. Unreported.

(3) *Re A Debtor* (*No. 946 of 1926*), [1939] Ch. 489 ; [1939] 1 All E.R. 735 ; Digest Supp. ; 108 L.J.Ch. 225 ; 160 L.T. 349.

(4) *Re Landau, Ex p. Trustee,* [1934] Ch. 549 ; Digest Supp. ; 103 L.J.Ch. 294 ; *sub nom. Re Landau, Ex p. Trustee* v. *Bankrupt,* 151 L.T. 190.

(5) *Re Garrett,* [1930] 2 Ch. 137 ; Digest Supp. ; *sub nom. Re Garrett, Official Receiver and Trustee* v. *Bankrupt,* 99 L.J.Ch. 341 ; 143 L.T. 402.

SPECIAL CASE STATED by His Honour JUDGE BURGIS sitting at the Burnley County Court for the opinion of the High Court of Justice pursuant to the Bankruptcy Act, 1914, s. 100 (3). The facts are fully set out in the judgment.

V. R. Aronson for the Official Receiver.

P. M. Oliver for the debtor.

MORTON, J. : This is a special case stated by the judge of the Burnley

County Court for the opinion of the High Court pursuant to the Bankruptcy Act, 1914, s. 100 (3), which is in the following terms :

> If any question of law arises in any bankruptcy proceedings in a county court which all the parties to the proceeding desire, or which one of them and the judge of the county court desire, to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination.

The special case states the facts in the following terms :

> 1. On June 18, 1934, a receiving order was made against the above-named debtor. The Official Receiver is the trustee of the estate. The statement of affairs disclosed liabilities expected to rank of £377 12*s*. 2*d*., assets £20, and deficiency £357 12*s*. 2*d*. 2. On Feb. 10, 1938, the court made an order (dated Mar. 1, 1938) under the Bankruptcy Act, 1914, s. 51 (1), that the sum of £5 monthly should be paid to the trustee out of the bankrupt's salary "during the bankruptcy" and "until the court shall make an order to the contrary."

A copy of the order is annexed to the case. The words "during the bankruptcy" and the words "until this court shall make an order to the contrary" in fact occur in the recital of the order, the operative part of the order being :

> It is ordered with the written consent of the director of services and establishments . . . that such portion of the salary shall be paid to the trustee accordingly.

I think that the effect of the word "accordingly" must be to import the preceding part of the order and to amount to an order that payment shall be made "during the bankruptcy" and "until the court shall make an order to the contrary." Then para. 3 of the case stated is as follows :

> On Mar. 10, 1938, the court granted the debtor an immediate discharge but directed that "the order under sect. 51 (1) dated Mar. 1, 1938, be expressly continued."

The exact terms of that order are these. I omit the opening words, and it continues as follows :

> . . . and whereas it has not been proved that the bankrupt has committed any of the misdemeanours or felonies mentioned in the Bankruptcy Act, 1914, s. 26, and proof has not been made of any of the facts mentioned in subsect. (3) of that section as amended by the Bankruptcy (Amendment) Act, 1926, s. 1, or in the Bankruptcy Act, 1914, s. 27, or that the bankrupt has been guilty of any misconduct in relation to his property and affairs, it is ordered that he be and hereby is discharged . . .

Then follow the material words :

> . . . and it is further ordered that the order under the Bankruptcy Act, 1941, s. 51 (1), made on Mar. 1, 1938, be expressly continued.

Then para. 4 of the case stated is as follows :

> On Nov. 23, 1939, the court varied the order dated Mar. 1, 1938, by reducing the monthly payments from £5 to £3 10*s*. in consequence of the debtor's necessary family expenses having increased since Mar. 1, 1938.

I do not think, however, that that variation affects the question which I have to determine. Paras. 5 and 6 state as follows :

> 5. The debtor is still continuing to pay the reduced amount of £3 10*s*. a month and there is in the hands of the Official Receiver a credit balance of £76 17*s*. 5*d*. 6. An application was made to me by the Official Receiver by notice in writing, dated Apr. 1, 1941, which was heard on June 19, 1941. The Official Receiver then asked for directions as to how he should deal with the sum of £76 17*s*. 5*d*. in hand and as to whether he should accept from the debtor further payments of the said monthly sum of £3 10*s*., and, Mr. Oliver appearing as counsel for the debtor consenting, I agreed to state the facts in the form of a special case for the opinion

of the High Court and to transmit the case to the High Court for the purposes of the determination thereof.

The questions for the opinion of the High Court are expressed as follows:

1. Whether that part of the order of discharge of Mar. 10, 1938, expressly continuing the operation of the order under sect. 51 (1) is valid and effective. 2. In A case it is held not to be valid, that directions be given as to how the moneys in hand to the credit of these proceedings shall be dealt with.

Counsel for the Official Receiver has told me something of the events leading up to this case. He tells me that ever since *Re Gold, Ex p. Gold* (1), decided in 1891, to which I must refer later, orders made under the Bankruptcy Act, 1883, s. 53 (2), and subsequently under the Bankruptcy B Act, 1914, s. 51, have usually directed that payments should be made during the bankruptcy. He also tells me that since 1891 it has been usual, if it was thought that the payments should continue after the discharge, so to direct either at the time when the discharge was granted or by separate order. In 1938, however, *Re A Debtor* (*No. 946 of 1926*) (2), C to which I must also refer later, came before Mr. Registrar PARTON. In that case, the bankrupt refused to make payments after he had been granted his discharge. As will appear later, the facts in that case were not identical with those in the present case. Mr. Registrar PARTON gave a decision in that case which has led to certain doubts as to the precise D position arising in the minds of official receivers all over England, and it is with a view to having those doubts resolved that the special case has been stated in the case now before me. Counsel for the Official Receiver says that the Board of Trade have no complaint whatever against the debtor in the present case. He has behaved with perfect E propriety throughout his bankruptcy, and this is a test case. In these circumstances, the Board of Trade have undertaken to pay the debtor's costs both here and in the county court, whatever the result of these proceedings.

The first case to which I was referred is *Re Gold, Ex p. Gold* (1). The F facts in that case were these:

A receiving order was made against the debtor on Dec. 18, 1888, upon which he was adjudicated bankrupt on Feb. 25, 1889. On Mar. 15, 1889, an order was made by the county court registrar, under the Bankruptcy Act, 1883, s. 53 (2), that the bankrupt should set aside out of his salary of £400 a year as a clerk, the sum of £48 yearly, to be paid by instalments of £4 a month to the trustee during the bankruptcy, such payments to be continued monthly until further order. On G July 19, 1889, the bankrupt's order of discharge was granted by the county court judge, subject to a suspension of 9 months from the date of the application for certain offences under the Bankruptcy Act, 1883, s. 28. [It is to be observed that in that case there was no express proviso in the order for discharge as to the continuation of the payment of the monthly instalments.] The discharge took effect as from Mar. 7, 1890, and up to that date the bankrupt paid the £4 a month, but subsequently refused to do so. On May 14, 1890, application was made to the H county court judge for the committal of the debtor for non-payment under the order of Mar. 15, 1889. This application was refused by the county court judge, and there was no appeal from his decision; but on Sept. 26, 1890, the application was renewed, and an order was then made by the judge declaring that the debtor was still liable to continue the payments.

From that order the debtor appealed, and the appeal was allowed upon certain grounds to which I need not refer in detail. In the course of his judgment, VAUGHAN WILLIAMS, J., said, at p. 45:

> I want also to make one more observation about the argument that was addressed to us by Mr. Mackenzie, it is the same argument that he adduced before the learned county court judge, and I have it here on a note before me. He suggests that the order of discharge had no effect, because *prima facie* the whole of the salary or income is property which vests in the trustee, and that that is in the instance of salary or income subject to the control of the court to say how much is to be set aside. If that means that where a man is in receipt of income at the time of his bankruptcy, after his discharge his income continues to be vested in the trustee, all I can say is that I entirely dissent from any such proposition, and I do not understand on what it is based. When you speak of the whole of his income, it is only the whole of his income up to the time of his discharge. Apart from any order of the court which has ordered the bankrupt to pay over a portion of his income notwithstanding the discharge, the income I think does not vest in the trustee in any way.

It is not disputed in the present case by counsel for the Official Receiver that the salary payable to the debtor in respect of the period after his discharge does not, subject to any order which may be made under sect. 51 or sect. 26 (2), vest in the trustees in bankruptcy. It is, I understand, in consequence of the concluding sentence of the judgment of VAUGHAN WILLIAMS, J., that the practice to which I have referred has been followed ever since.

The decision of Mr. Registrar PARTON was given on July 6, 1938. The facts in that case were not precisely similar to those in the present case. What happened in the case before Mr. Registrar PARTON was this. On Dec. 15, 1936, the bankrupt having been adjudicated bankrupt on Sept. 23, 1926 :

> . . . it was ordered that the respondent's discharge be suspended for six months and that he be discharged as from June 15, 1937, without prejudice to any application or order made or to be made under sect. 51 (2), and on Dec. 17, 1936, by order of that date after reciting that it appeared to the court that the respondent was in receipt of net earnings and salary amounting to at least £2,500 per annum from his employment as a musician and that it appeared to the court just and reasonable that the annual sum of £312, a portion of the said salary of the respondent, ought to be paid to the Official Receiver as trustee by monthly payments of £26 during the bankruptcy in order that the same might be applied in payment of his debts and that the first of such payments ought to be made on Dec. 26, 1936, and be continued monthly until the court should make order to the contrary, it was ordered that the said sum should be paid by the respondent in manner aforesaid out of the respondent's said salary.

Mr. Registrar PARTON took the view (I am quoting from his judgment) :

> . . . that the words "during the bankruptcy," although on their literal interpretation they cover the whole period whilst a bankruptcy subsists, namely, until payment of all debts in full, or annulment or possibly collection of all possible assets and declaration of a final dividend [then he refers to sect. 26 (9)] they must, on the context, when occurring in an order under sect. 51 (2) be read as during the bankruptcy whilst the bankrupt remains undischarged.

He then says :

> It follows from what I have said that the order made under sect. 51 (2) on Dec. 17, 1936, was effective and binding on the respondent until the period of the suspension of his discharge ran out, but the court had no power to continue such order after that time, as it purported to do. The order, however, is still in force, and it seems to me will continue in force unless and until it is revoked or altered by an order of the court, made in court, and not in chambers, on the application of the respondent or the Official Receiver.

There was no appeal from that decision by Mr. Registrar PARTON, but, on an application by the Official Receiver for a rehearing of the application for a discharge and a variation of the order of discharge :

> . . . the registrar directed a rehearing and at the rehearing varied the order of discharge by making it subject to a condition for payment of an annual sum (later to be increased) to the Official Receiver for distribution among "the creditors

in the bankruptcy " until they had received 10*s*. in the £.

There was an appeal from that order, *Re A Debtor* (*No.* 946 *of* 1926) (3), but the appeal was dismissed. In the course of his judgment, SIR WILFRID GREENE, M.R., said—and I regard this observation as having an important A bearing on the present case—at p. 501 ([1939] 1 All E. R., at p. 742):

> The court had jurisdiction in bankruptcy under the Act; the order of discharge did not take away the jurisdiction of the court in bankruptcy, because admittedly the discharge of the bankrupt does not put an end to the bankruptcy regarded as a series of judicial and administrative acts and rights and powers.

Later, CLAUSON, L.J., who agreed, said, at p. 504 ([1939] 1 All E.R., B at p. 744):

> I should only wish just to add this caution. There was no appeal from the judgment of Mr. Registrar PARTON, which was delivered on July 6, 1938, and this case of course has been argued, and has had to be argued in this court, on the footing that that decision was correct. It is not for us to express, as there is no appeal, any view about it, but I think it is only right, as an assistance to those who have to administer the Act, to point out that any court which has to consider a similar problem in the light of Mr. Registrar PARTON's judgment of July 6, 1938, will not C be able to consider the problem without having regard to the reasons for the present judgment which have been expressed by SIR WILFRID GREENE, M.R.

I think that it is possible—although this, of course, is only conjecture —that in saying that CLAUSON, L.J., had in mind other passages in the judgment of SIR WILFRID GREENE, M.R., than that which I have just read.

D The sections of the Act to which I think it necessary to refer for the purposes of my judgment are these. First of all, I shall refer to sect. 51 (1), the section under which the order of Feb. 10, 1938, in the present case was made. It is in the following terms:

> Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive E for distribution amongst the creditors so much of the bankrupt's pay or salary as the court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct . . .

Then there are provisions as to communicating with the chief officer of the department. Sect. 26 (2), which deals with the discharge of the F bankrupt, is in the following terms:

> On the hearing of the application the court shall take into consideration a report of the Official Receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property . . .

G It is plain from that section, read in conjunction with the sections which I shall now read, that the conditions may be imposed with respect to property which, apart from the imposition of any such condition, would not vest in the trustee in bankruptcy. The Bankruptcy Act, H 1914, s. 18, provides that, on the adjudication of a debtor, the property of the bankrupt shall become divisible amongst his creditors, and shall vest in a trustee. It is common ground, however, that the property so vested, apart from any such order as that to which I have referred, does not include salary payable to the bankrupt after he has obtained his discharge. There are two other subsections of sect. 26 to which I should refer. Subsect. (8) provides as follows:

> The powers of suspending and of attaching conditions to a bankrupt's discharge may be exercised concurrently.

Subsect. (9) provides as follows :

> A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee, and, if he fails to do so, he shall be guilty of a contempt of court . . .

I need not read the rest of that subsection. There is no doubt that, even though a bankrupt has been discharged, the trustee continues as a trustee, and he has duties to perform in regard to which under that subsection he can require the assistance of the discharged bankrupt, and, as Sir Wilfrid Greene, M.R., said, at p. 501 ([1939] 1 All E.R., at p. 742) :

> . . . the discharge of the bankrupt does not put an end to the bankruptcy regarded as a series of judicial and administrative acts and rights and powers.

In this case, I must consider first, I think, whether money which never became the property of the trustee under sect. 18 of the Act can be the subject of an order under sect. 51. In my view, this question is concluded by the decisions in *Re Landau, Ex p. Trustee* (4) and *Re Garrett* (5). These cases establish that money which does not become vested in the trustee under sect. 18 can be the subject of an order under sect. 51. In *Landau's* case (4), where the money in question was income payable to a wife by a husband under a consent order of the Divorce Court, Lord Hanworth, M.R., dealing with an argument by *Mr. Tindale Davis*, said, at pp. 552, 553 :

> He [Mr. Tindale Davis] says that, reading sect. 51 in the light of that definition of "property" [the definition in the Bankruptcy Act, 1914, s. 167] and sect. 38, unless this income or salary is "property" within sect. 38, no order can be made whether under sect. 51 (1) or (2). Now it is to be observed upon that argument that if that condition to the operation of sect. 51 is to prevail, it would seem that much of the import of sect. 51 is cut away ; for, if what is to be dealt with under sect. 51 is only such periodical payments as have already under the term "property" become within the control of the trustee, then it would seem that the power given by sect. 51 is narrowed and limited to a very small extent. By reason of the authorities to which I will refer in a moment, I cannot accept the view that sect. 51 is controlled and limited by sect. 38.

In *Re Garrett* (5), Farwell, J., had to consider whether the court could make an order under sect. 51 (2) in respect of a pension received by a retired detective-inspector of the City of London Police Force, and, after finding that the effect of certain provisions was that, when a police officer became bankrupt, his pension was not affected, and did not vest in the trustee, continued as follows, at p. 141 :

> But when I come to sect. 51 (2), different considerations apply. That subsection empowers the court to direct that the whole or part of a bankrupt's pension, if it thinks just, shall be paid to the trustee for the benefit of the bankrupt's creditors. The subsection applies both to property that vests in the trustee under sect. 18 (1) and also to property not so vesting.

These decisions seem to me to make it plain that the orders made under sect. 51 need not be limited to property vested in the trustee under the other provisions of the Act.

I must next consider the meaning of the words "during the bankruptcy" in the order of Mar. 1, 1938, which was continued by the order of Mar. 10, 1938. I think that it is plain that, when the latter order directs the former

order to be continued, it imports that it is to be continued during the bankruptcy or until further order. In my view, the true construction of the words "during the bankruptcy" is not that which was attributed to them by Mr. Registrar PARTON in his decision of July 6, 1938. As I
A have said, the facts in the two cases are not identical, and I am dealing now with the construction of these words in the order which is before me. In my view, having regard to the fact that, as was said by SIR WILFRID GREENE, M.R., in *Re A Debtor* (*No. 946 of 1926*) (3), at p. 501 ([1939] 1 All E.R., at p. 742), "the discharge of the bankrupt does not put
B an end to the bankruptcy," it would not be right for me to hold that the words "during the bankruptcy" refer to a period which comes to an end the moment the bankrupt gets his discharge. I see no reason for limiting the words in that way on the wording of the order to which I have referred. In the course of the argument, I asked counsel for the
C Official Receiver how long he submitted that a bankruptcy did in fact continue if the words "during the bankruptcy" referred to some period longer than the period ending with the discharge of the debtor. He disclaimed any necessity in the present case to put a definite limit which should apply in all cases, but he submitted that a bankruptcy would in
D fact come to an end clearly if it were annulled, or, he suggested, if the debts were paid in full, or if a scheme or composition under sect. 21 of the Act were accepted by the creditors and approved by the court. I think that it is not necessary for the purposes of this case that I should go into that matter any further.

E There is one other aspect of the case which I should mention. If the words "during the bankruptcy" in the order of Mar. 1, 1938, have the meaning which I have attributed to them, then the order of Mar. 10, 1938, which continues the operation of the previous order, is, in my view, valid and effective, although it may be that it was unnecessary
F to make that express provision in the order. If, on the other hand, contrary to my view, the words "during the bankruptcy" in the order of Mar. 1, 1938, did cover only the period ending with the discharge of the debtor, it seems to me that the true view of the order of Mar. 10, 1938, must be that the court is imposing a condition that, notwithstanding
G the fact that the period limited by the order of Mar. 1, 1938, has come to an end, the provisions contained in the order of Mar. 1, 1938, shall still continue to be in operation and the same portion of the debtor's salary shall continue to be paid to the trustee. I think that what the court did in effect by the order of Mar. 10, 1938, whether or not it was entirely
H necessary, was to impose on the discharge of the bankrupt the condition that the order of Mar. 1, 1938, should continue in operation.

For these reasons, I have arrived at the conclusion that the answer to the first question is that that part of the order of discharge of Mar. 10, 1938, which expressly continues the operation of the order under sect. 51 (1), made on Mar. 1, 1938, is valid and effective. That being so, the second question raised by the special case does not arise, and, in view of the arrangement which has been made with regard to the costs of these proceedings, I need say nothing about the costs.

Solicitors: *Solicitor to the Board of Trade* (for the applicant); *Bracewell & Leaver*, agents for *J. K. Currie*, Burnley (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

FITZWILLIAM'S (EARL) COLLIERIES CO. *v.* PHILLIPS.

[KING'S BENCH DIVISION (Lawrence, J.), **October 7, 8, 13, 1941.**]

Income Tax—Mining lease—Right to let down surface—Acreage payment as liquidated damages—Easement—Rent—Finance Act, 1934 (*c.* 32), *s.* 21.

A colliery company under two mining leases contracted to pay to the lessor sums of £10 and £5 per acre of so much of the coal demised as should have been worked and gotten during the preceding half-year as liquidated damages in respect of the overlying surface. It was contended that, although these payments were made once and for all in respect of each acre and would be capital in the hands of the recipient, yet they would be rent within the meaning of the Finance Act, 1934, s. 21, in respect of an easement within the meaning of the same section:—

HELD: the rights granted were easements within the meaning of the section, and the payments were rent within the meaning of the section.

Inland Revenue Comrs. v. *New Sharlston Collieries Co., Ltd.* (1) *followed.*

[**EDITORIAL NOTE.** It is decided that the present case falls within the *ratio decidendi* of *Inland Revenue Comrs.* v. *New Sharlston Collieries Co., Ltd.* (1), and the decision in that case is here followed. It was sought to distinguish that case from the present one by showing that in that case the colliery owner was acquiring an immunity from action in respect of damage due to subsidence, but that here there was no immunity from action but only a provision which agreed beforehand the amount of damages recoverable. This contention was rejected, and it is held that the right to let down the surface is an easement within the meaning of the section, the language of which, since it uses words of general import and not technical expressions, is sufficiently wide to include a right to withdraw support from the surface given in the terms here used. It will be noted that the payments in question have certain characteristics not usually associated with rent, but it is pointed out that the rents reserved under a mining lease usually differ in this respect from the rent reserved under an ordinary occupation lease.

AS TO ASSESSMENT OF SURFACE DAMAGE PAYMENT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 140, 141, para. 283; and FOR CASES, see DIGEST, Vol. 28, p. 8, No. 28, and Supp. For the Finance Act, 1934, s. 21, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 342.]

Case referred to:

(1) *Inland Revenue Comrs.* v. *New Sharlston Collieries Co., Ltd.*, [1937] 1 K.B. 583; [1937] 1 All E.R. 86; Digest Supp.; 106 L.J.K.B. 375; 156 L.T. 279; 21 Tax Cas. 69.

APPEAL by the taxpayers by way of case stated from a decision of the Commissioners for the purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The appellants were a colliery company, and under two mining leases there were reservations of £10 and £5 per acre of so much of the coal demised as should have been worked and gotten during the preceding half-year as liquidated damages in respect of compensation for damage to and subsidence of the surface. The question for decision was whether the right thus acquired to let down the surface was an easement within the meaning of the Finance Act, 1934, s. 21, and whether the acreage payments, which were not periodical payments but were to be made once and for all in respect of each acre, were rent within the meaning of the same section.

F. Heyworth Talbot for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: The question in this case is whether the appellant colliery comapny is entitled to deduct payments which it has contracted to make under two mining leases, of £10 and £5 per acre of so much of the coal demised as shall have been worked and gotten during the preceding half-year, as liquidated damages in respect of the overlying surface. This question depends upon whether these payments are rents or periodical payments in the nature of rent either in respect of lands or in respect of an easement, within the meaning of the Finance Act, 1934, s. 21. The expressions "rent" and "easement" are defined in sect. 21 as follows:

> The expression "rent" includes a rent service, rentcharge, fee farm rent, feu duty or other rent, toll, duty, royalty or annual or periodical payment in the nature of rent, whether payable in money or money's worth or otherwise, but does not include any of the payments enumerated in rules 1 to 6 of No. II of Schedule A. The expression "easement" includes any right, privilege or benefit in, over or derived from land.

In *Inland Revenue Comrs.* v. *New Sharlston Collieries Co., Ltd.* (1), it was held that a liberty granted by the owner of the surface to work coal thereunder, notwithstanding that such working might cause subsidence, in consideration of a minimum yearly rent and a further acreage rent, the surface owner's right to compensation for damage to buildings being unaffected, was an easement within sect. 21, and it is contended for the Crown that that case is decisive of the present. Counsel for the appellants, however, contends that that case is distinguishable on the grounds that here the other rents are considerations for the liberty to withdraw support, and that these payments are truly liquidated damages for the damage which may be caused by such withdrawal, and, further, that the *ratio decidendi* of *Inland Revenue Comrs.* v. *New Sharlston Collieries Co., Ltd.* (1) was that the colliery owner was there acquiring an immunity from action for damage due to subsidence. He refers specially to the judgment of SLESSER, L.J., at p. 79, and to that of GREENE, L.J., at p. 91, whereas in the present case the lease did not provide, so he argues, for an immunity from action, but merely provided that the damages should be agreed beforehand at the acreage payments stipulated for.

In my opinion, the present case cannot be distinguished from *Inland*

Revenue Comrs. v. *New Sharlston Collieries Co., Ltd.* (1). The words of GREENE, L.J., show that such a fine distinction as that between a lease providing for immunity from action for damages for subsidence and a lease providing for payment of a liquidated sum for damage for subsidence ought to be disregarded. He said, at pp. 611, 612; A

> From this point of view it appears to me that by virtue of the indenture of 1901 the respondents obtained an "easement" in that they obtained the right to act in such a way as to affect the physical condition of the surface without exposing themselves to the operation of certain of the legal remedies which would otherwise have been available to the surface owners. It is perhaps worth noticing that, if the respondents' contention be right, the effect of the section could in general be avoided, in a case where a concern desired to obtain an easement, by the simple B expedient of so drafting the document as to make it in effect an undertaking not to sue, for example, for damages for trespass in a case where a wayleave was desired. It appears to me that the language of the definition clause, using as it does words of general import and not technical expressions, is sufficiently wide to prevent such a result.

I see no distinction between a liberty to work coal, notwithstanding that such working may cause subsidence, in consideration of certain C rents, and a liberty to work coal and in so doing to withdraw support from the surface, without making any compensation except to pay certain acreage payments as liquidated damages in respect of the overlying surface. I hold, therefore, that these leases did grant easements within the meaning of the Finance Act, 1934, s. 21. D

As to the question whether the acreage payments in question are rent within sect. 21, it has been argued for the appellant that the payments are not so described, that they are not periodical, that they are not in consideration of the occupation or user of land, that they are payable once and for all for each acre, that they are truly liquidated damages, that E they would be capital in the hands of the recipient, and, therefore, that they have none of the characteristics of rent. In my opinion, these arguments are unsound. It must be remembered that colliery leases differ from other leases in that they are leases of wasting assets. Payments under colliery leases may, therefore, be in the nature of capital F in the hands of the recipient but still fall within such a definition of "rent" as is contained in sect. 21. The fact that the payment is made once and for all for each acre worked does not distinguish it from a colliery rent which is calculated on the acreage worked. Moreover, the expression "royalty" is included in the definition, and a royalty is G essentially a payment once and for all in respect of a particular subject. The payment is periodical in the sense that it is payable half-yearly, and it is paid for the use and occupation of land in that it presupposes subsidence of the land, owing to the working of the coal beneath. The appeal is, therefore, dismissed with costs. H

Appeal dismissed with costs.

Solicitors: *Andrew, Purves, Sutton & Creery*, agents for *Newman & Bond*, Barnsley (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re MIDLAND BANK, LTD.'S. APPLICATION.

[CHANCERY DIVISION (Uthwatt, J.), **October 21, 1941.**]

Emergency Legislation—Mortgage—Realisation of mortgage—Appointment of receiver—Trustee in bankruptcy of mortgagor—Leave to proceed—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4).

The mortgagor's trustee in bankruptcy, although the proper person to be the respondent to a summons under the Courts (Emergency Powers) Act, 1939, for leave to proceed, is not a person "liable to pay the debt or perform the obligation in question" within the meaning of sect. 1 (4) of the Act, and the court has, therefore, no jurisdiction to grant relief to the mortgagor's trustee. Similarly, the assignee of the equity of redemption cannot obtain relief under the Act.

[**EDITORIAL NOTE.** This is an extension of the decision in *Re National Provincial Bank, Ltd.* v. *Liddiard* (1), where it was held that, in the case of a collateral mortgage containing no covenant to pay the mortgage debt, the mortgagor was not liable to perform the obligation in question and, therefore, not entitled to relief under the Emergency Legislation. It is here shown that precisely the same reasoning applies to an assignee of the equity of redemption and the trustee in bankruptcy of the mortgagor. It would seem that the case of an assignee of the equity of redemption should be limited to the case where the assignee does not enter into a new covenant with the mortgagee.

FOR THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946.]

Cases referred to:

(1) *National Provincial Bank, Ltd.* v. *Liddiard*, [1941] 1 Ch. 158; Digest Supp.; *sub nom. Re National Provincial Bank, Ltd.*, [1941] 1 All E.R. 97.

(2) *Re Midland Bank, Ltd.*, [1941] 1 Ch. 350; *sub nom. Franklin* v. *Midland Bank, Ltd.*, [1941] 2 All E.R. 135; Digest Supp.

(3) *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman*, [1941] 1 Ch. 32; [1940] 4 All E.R. 212; Digest Supp.

APPLICATION by the Midland Bank, Ltd., under the Courts (Emergency Powers) Acts, 1939 and 1940, for leave to proceed to exercise any powers which may be available to them by way of appointment of a receiver, sale or otherwise.

C. R. D. Richmount for the applicants.

W. A. L. Raeburn for the respondent.

UTHWATT, J.: This case raises a short point under the Courts (Emergency Powers) Acts. The position is that Mary Elizabeth Cecilia Waller mortgaged certain property to the Midland Bank, Ltd. Under this mortgage, there is now a considerable sum due, and to the extent of the sum secured by that mortgage the mortgagor was a debtor to the bank. In 1941, a receiving order in bankruptcy was made against the mortgagor, and that was followed by an order for adjudication. Under the Courts (Emergency Powers) Act, 1939, the bank have taken out a summons to which the mortgagor's trustee in bankruptcy is the respondent asking that they may be at liberty to exercise all the powers vested in them by their mortgage so far as they relate to the appointment of a receiver, for the exercise of their power of sale, and otherwise. In the course of the hearing before me, the bank stated through their counsel that they do not wish at the moment to exercise all those powers, and this application is now an application that they may exercise such powers as they have with respect to the appointment of a receiver.

The question I have to decide is whether I have any jurisdiction under the Courts (Emergency Powers) Act, 1939, to exercise the discretion conferred by sect. 1 (4). The first three subsections specify the various cases in which it is necessary that the person who desires to enforce rights must apply to the court for leave so to do. Sect. 1 (4), the only section of the Act which lays down any principle upon which the court is to act when the application comes before it, provides as follows :

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

Under the subsection, the person to whose affairs attention is to be directed is the person liable to satisfy the judgment, pay the debt, or perform the obligation in question. The position in law of the bankrupt and the trustee in bankruptcy is quite clear. The effect of the bankruptcy proceedings is that no action to recover the debt can be taken against the bankrupt, and, on an order for discharge being made, the bankrupt will be released from the debt, whether the debt has been proved or not. The position of the trustee in bankruptcy is that he is in no way personally liable for any part of the mortgage debt, but the equity of redemption in the mortgaged property is vested in him. It is quite clear, to my mind, that the bankrupt mortgagor is not a necessary or proper party to these proceedings, for no right is sought to be enforced against her personally or against property to which she is entitled. The trustee is the only person who in law has an interest in the matter, and the only proper respondent. The question which I have to decide is whether, in these circumstances, there is a person who, within the meaning of subsect. (4), is " liable to pay the debt or perform the obligation in question." In my opinion, the answer is in the negative. This is " no obligation in question." The point is, I think, covered by the construction given to the subsection in *National Provincial Bank, Ltd.* v. *Liddiard* (1) and *Re Midland Bank, Ltd.* (2), and it is unnecessary for me to go over the same ground again. A similar point arises where the equity of redemption has been assigned by the mortgagor and proceedings are taken against the assignee to enforce the security, for the assignee is not a person liable to the mortgagee in respect of any obligation sought to be enforced. It is unfortunate that the court has not jurisdiction to grant relief under the subsection in cases where the trustee in bankruptcy or an assignee of the mortgagor is the person interested in the mortgaged property, and its power in the matter would appear to be confined to the inherent power of the court referred to by FARWELL, J., in *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman* (3). It is unnecessary, however, to consider any exercise of this inherent power in the present case, as the bank have taken the proper course of limiting their application at this stage to the question of the appointment of a receiver. I will make an order giving the bank leave to exercise such powers as they may have with respect to the appointment of a receiver, upon the footing that such receiver's powers are to be confined to those vested in receivers by the Law of Property Act, 1925, but the bank are to be at liberty to give directions to the receiver pursuant to the Law of Property Act, 1925, s. 109 (8) (v). Subject to that, I propose to stand the application over, the bank being at liberty to apply to exercise any other remedies they may have.

Costs to be added to the security. Leave to appeal.

Solicitors: *Candler, Sykes & Dore*, agents for *Leonard Gray & Co.*, Chelmsford (for the applicants); *M. A. Jacobs & Sons* (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

In the Estate of HANLEY.

[COURT OF APPEAL (Goddard and du Parcq, L.JJ.), **October 20, 1941.**]

Probate—Practice—Partial intestacy—Residue undisposed of—Claim by Crown to grant of administration—Persons to be cited—Administration of Estates Act, 1925 (*c.* 23), *s.* 46 (1) (vi)—*Non-Contentious Probate Rules, r.* 119.

The testatrix died in Feb., 1940, leaving a will by which she gave certain legacies. She appointed no executor and left no kin. The Treasury, on behalf of the Crown, claimed the undisposed of residue as *bona vacantia*, and asked that the Crown should take its place in the fourth category of persons entitled to a grant of administration under r. 119, that is, as the person entitled upon an intestacy where the residue is not wholly disposed of, and not in the eighth category, where the Crown is expressly mentioned. The object of the application was to avoid the necessity of citing creditors and legatees:—

HELD: as the Crown claimed the estate by virtue of the right of the Crown to the residue as *bona vacantia*, the Crown was not entitled to a grant under the fourth category as a person taking upon an intestacy where the residue is not wholly disposed of, but under the eighth category, and it was, therefore, necessary to cite the legatees and creditors entitled in priority.

[**EDITORIAL NOTE.** The right to a grant of administration to the estate of a deceased is regulated by the interest of the proposed grantee in that estate, the person having a greater interest being entitled in priority to one having a less. The order of priority is regulated by the rules, and, where a person low down in the list applies for a grant, he must clear off all those entitled in priority to him. This is done by citation or, where it is proved that none entitled in priority are in existence, by a registrar's order. The object of this application was to avoid the clearing off of three categories of persons entitled to a grant, the Crown claiming to take as a person entitled upon an intestacy, since its right to *bona vacantia* is now a statutory right under the Administration of Estates Act, 1925, s. 46 (which describes the persons entitled to take on an intestacy). This contention was, however, defeated by the fact that the Crown is specifically mentioned at the bottom of the list of the persons entitled to a grant, and it is held that the fact that the Crown is specifically mentioned at the bottom of the list requires that all persons entitled to a grant other than the Crown must be cleared off before a grant can issue to the Crown. The particular grant here dealt with is one with the will annexed.

As to Grant to the Crown of Administration with Will Annexed, see HALSBURY, Hailsham Edn., Vol. 14, pp. 258-261, paras. 454-460; and for Cases, see DIGEST, Vol. 23, pp. 182-191, Nos. 2076-2192.]

Appeal by the Treasury Solicitor from an order of Lord Merriman, P., dated July 25, 1941. The facts are fully set out in the judgment of Goddard, L.J.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Hon. Victor Russell* for the Treasury Solicitor.

The Attorney-General: The Crown, being entitled to the residue as *bona vacantia*, is, under r. 119, entitled to a grant as the person entitled to the residue, and in priority to legatees and creditors. It is entitled to a grant without citing any of the persons entitled in priority. This matter first came up in its present form in 1940 in a case which came before Hodson, J., who decided as Lord Merriman, P., has now decided. The Crown is not likely to be an executor. The Crown, however, might well be a specific legatee or a residuary legatee, or a creditor. In all these cases, the Crown is entitled to take its place in the list. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, deals with the question of the discretion of the court. The section does not specifically refer to the Crown. The Crown, however, may apply, and there may be cases in which it would be right and proper for the Crown to do so. If a testator made the Crown his residuary legatee, it is impossible to think that the Crown should be placed in a position different from that of an individual. In an intestacy, the only persons who can be concerned are the Crown, the next of kin and the creditors. A residuary legatee may have a far smaller interest in an estate than that of a specific legatee. Nevertheless, he is placed ahead of specific legatees in respect of a grant. If the decision of Lord Merriman, P., is correct, the Crown would have to cite all the creditors before it could obtain a grant.

Goddard, L.J.: This appeal raises a short point on the construction of r. 119 of the Non-Contentious Rules of the Principal Probate Registry. The short facts are that Miss Hanley died in Feb., 1940, a spinster, leaving a will but having appointed no executor and leaving no kin. She left some legacies and, it may be assumed, a few debts. The Crown claims the residue as *bona vacantia*, and raises the question whether or not it should take its place in the fourth category of persons entitled to a grant of administration under r. 119, or, as the rules state in terms, in the bottom place. The rule is one which gives the priority of persons who are entitled to a grant of administration with will annexed, and, if a person in a lower category wishes to apply where there are persons of the higher category, the practice requires that the persons in the higher category should be cited. We can ignore, for the purposes of this application, the first three classes of persons. The rule continues as follows :

> (4) Ultimate residuary legatees or devisees, or where the residue is not wholly disposed of, the persons entitled upon an intestacy. (5) The legal personal representatives of persons indicated in (4). (6) Legatees or devisees, or creditors. (7) Contingent residuary legatees or devisees, or contingent legatees or devisees, or persons having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate. (8) The Crown.

The Attorney-General argues that, as the Crown becomes entitled to the residue which is left by Miss Hanley, the Crown can take its place as one of the classes in r. 4, but both LORD MERRIMAN, P., and HODSON, J., have held that, because the Crown is specially mentioned, and comes at the end of these classes or categories, it must remain in that position, with the result that the creditors, devisees or legatees will have to be cited before it can obtain a grant. I think that the construction put upon this rule, both by LORD MERRIMAN, P., and by HODSON, J., is the correct one. If the will had left the money direct to the Crown, as some testators have been known to do, the Crown would have come in obviously under the fourth class as the ultimate residuary legatee of the person who had made the will. If, however, the Crown takes the estate by virtue of the right of the Crown to *bona vacantia*, I do not think that it can be said that it is a person entitled upon an intestacy within the meaning of that rule. By the Administration of Estates Act, 1925, s. 46 (1) (vi), it is enacted :

> In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as *bona vacantia*, and in lieu of any right to escheat.

The Act, therefore, says in express terms that the money of a person dying in those circumstances goes to the Crown as *bona vacantia*, and that, I think, must be the matter which the framers of the rule had in mind when they placed the Crown at the bottom of the list. In these circumstances, I am of opinion that the decision of LORD MERRIMAN, P., was right, and this appeal must be dismissed.

DU PARCQ, L.J. : I agree.

Appeal dismissed.

Solicitor : *Treasury Solicitor* (for the Treasury Solicitor).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

WOOLFALL & RIMMER, LTD. *v.* MOYLE AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.), **October 17, 20, 1941**.]

Insurance—Employers' liability—Construction of policy—Condition in policy—Employer to take reasonable precautions to prevent accidents—Proposal form—Question as to safety of works and plant—Whether directed to present or future state of works and plant.

The respondents, having been held liable to pay damages and compensation in respect of the death of one of their workmen and in respect of personal injuries sustained by three other of their workmen, claimed to be indemnified by the appellants, with whom they were insured against liability to the workmen in respect of accidents. The policy contained a reference to the proposal form which was the basis of the contract and was incorporated therein. One of the questions contained in the proposal form was this: "Are your machinery, plant and ways properly fenced and guarded and otherwise in good order and condition?" The answer given was: "Yes." The accident occurred through the use of a defective board in the scaffolding, and it was contended for the appellants that the question did not merely relate to the time when the question was answered, but extended to the future condition of the machinery, plant and ways during the currency of the policy. A second point taken was whether or not a strict observance of a condition in the policy was a condition precedent to the liability of the underwriters. The condition was as follows: "The assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations." It was contended that this condition imposed upon the assured a duty to take care co-terminous with, and similar in quality to, the obligation to take care which lies upon the employer *vis-a-vis* his workmen, and that the employers would be in breach of the condition if their foreman were negligent in carrying out the task entrusted to him, notwithstanding that they had selected a competent foreman for the work:—

HELD: (i) the question in the proposal form did not relate to the future, but was contained in the proposal form in order that the existing condition of the machinery, plant and ways should be ascertained and in order that the underwriters should be able to find out the sort of person with whom they were dealing.

(ii) the respondents were not prevented from claiming from the underwriters by reason of the condition, because, as the delegation of the work was reasonable, and as the respondents had taken reasonable precautions in selecting a competent foreman, their obligation under the condition was at an end.

[**EDITORIAL NOTE.** The liability of an employer to a workman, except in claims under the Workmen's Compensation Act, presupposes that he has been guilty of negligence or breach of statutory duty If he is to be insured against this liability, it would seem to be futile to take out a policy with a condition that he was not covered if he was guilty of negligence or breach of statutory duty. Yet this seems, in effect, to have been the main argument for the insurers in this case. If it had been successful, it would seem that the policy would only have been effectual to indemnify the employers against claims under the Workmen's Compensation Act, for which, no doubt, a policy could have been secured on less onerous terms. The Court of Appeal remark that wide limitations on the liability of the insurers should not be made the subject of insignificant conditions. This, perhaps, is a policy of perfection, for documents in general use are now drafted so that the common parts are in the body of the document and specific matters, which may vary in individual documents, are relegated to schedules. This is a practical necessity, but, if, as in this case, the liability is severely limited by the terms in the schedule or table of conditions, particular attention should be drawn to it in the principal part of the document.

As to Scope of Liability Insurance, see HALSBURY, Hailsham Edn., Vol. 18, pp. 543, 544, paras. 863-865; and for Cases, see DIGEST, Vol. 29, pp. 404-406, Nos. 3195-3203.]

Cases referred to:

(1) *Concrete, Ltd.* v. *Attenborough* (1939), 83 Sol. Jo. 946; Digest Supp.

(2) *Pictorial Machinery, Ltd. v. Nicolls* (1940), 45 Com. Cas. 334; Digest Supp.

(3) *National Farmers Union Mutual Insurance Society, Ltd.* v. *Dawson* (1941) 70 Lloyd, L.R. 167.

(4) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 36 Digest 95, *633*; 60 L.J.Q.B. 683; 65 L.T. 467.

Appeal by the defendants from a judgment of Asquith, J., at the Liverpool Assizes, dated Apr. 18, 1941.

The action was brought by the plaintiff company against two Lloyds' underwriters for a declaration that they were entitled to an indemnity in respect of sums which they had been held liable to pay, and had, in fact paid, under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1925, to certain of their employees or the dependants of such employees. In answer to the claim, the defendants pleaded certain provisions in the contract of insurance which, they said, absolved them from liability to indemnify the plaintiffs. The plaintiffs are painters and decorators carrying on business at Southport. At the time of the accident, which occurred on Oct. 25, 1939, their men had been engaged in camouflaging the exterior of a factory, and had gone on to paint the inside of the roof of a part of the factory called the smithy. Scaffolding had been erected under this roof consisting of certain poles running longitudinally and attached to a series of trusses under the roof. Across these poles, and supported by them at intervals, ran cross-pieces known as putlogs or ledgers. Supported by these ledgers, and at right angles to them, were two lines of boards called runners, and the runners constituted the platform upon which the men stood while painting. At the material time, five employees of the plaintiffs were standing on runners supported by a ledger which broke. The ledger in question was a plank 9ft. long, 8½ins. wide, and 1½ins. thick, and it covered a span of 8ft.. The accident resulted in one workman being killed and three others being more or less seriously injured. The material terms of the insurance policy and the proposal form are set out in the judgment of Lord Greene, M.R. Judgment was given by Asquith, J., for the plaintiff company for all the sums claimed and costs.

F. W. Beney and *C. H. Spafford* for the appellants.

F. A. Sellers, K.C., and *H. I. Nelson* (for *B. E. Nield* on war service) for the respondents.

Beney: None of the directors of the company concerned himself with the purchase and the supply of the timber used in the scaffolding. That matter was left entirely to the foreman. The foreman admitted that he had no suitable timber available. If something has been done which should not have been done, or if something which should have been done has not been done, the employers are responsible. The employers left the whole matter to a man who took their place, so far as condition 5 in the policy was concerned. They cannot get rid of the burden which the condition imposed upon them by taking that course. In *Concrete, Ltd.* v. *Attenborough* (1), it was said by Branson, J., that the object of a condition was to qualify the general obligation undertaken in the first instance. In the present case, the condition says that the assured shall take reasonable precautions to prevent accidents. The condition limits the otherwise wide terms of the indemnity given by the policy, and, apart from that, it would be meaningless. The word "assured" in the condition does not merely mean the insured personally. It includes the persons to whom the insured may delegate matters to which the condition relates and covers the acts of those persons also. As regards the question and answer in the proposal form, the question is not contemplating only the existing state of things. It also contemplates that the existing state of affairs shall continue during the currency of the risk. It means that existing material will be kept in good repair. [Counsel referred to *Pictorial Machinery, Ltd.* v. *Nicolls* (2), *National Farmers Union Mutual Insurance Society, Ltd.* v. *Dawson* (3) and *Smith* v. *Baker & Sons* (4).]

Counsel for the respondent company were not called upon.

Lord Greene, M.R.: Two points arise in this appeal. I will take the second point first. The policy, which insures the respondents against liability to their workmen either at common law or under the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1925, contains a reference to the written proposal and declaration which it is agreed are the basis of the contract and are to be considered as incorporated therein. The proposal form is a printed form described as "Employers' Liability Policy at Lloyds," and it asks a number of questions with regard to the circumstances in which the workmen are presumably going to be employed. One of the questions was this:

> Are your machinery, plant and ways properly fenced and guarded and otherwise in good order and condition?

The answer to that question was: "Yes." It is argued in this court, as it was argued before Asquith, J., that that question asks a great deal more than it professes on the face of it to ask. It is said that the question does not merely relate to the moment of time at which the proposer is answering it, but extends to the future condition of the machinery, plant and ways during the currency of the policy. In my opinion, there is not a particle of justification for reading into that perfectly simple question any element of futurity whatsoever. The argument that the court should read in such an element was based, as I understood it, upon the suggestion that the answer would be valueless from the underwriters' point of view unless that were done. I entirely disagree. The value of the question, as I construe it, to the underwriters is that it enables them to find out what sort of person they are dealing with, i.e., whether he is the sort of person who keeps his machinery plant and ways properly fenced and guarded and otherwise in good order and condition. Obviously, if he were the sort of person who was careless about that, so that, at the time the question was answered, his machinery, plant and ways were not in good order and condition, the risk would be of a different character. I am quite unable to accept the argument. If the underwriters intended to refer to the future, it is most unfortunate that a printed document of this kind, tendered by Lloyds underwriters to persons desiring to insure with them, should not be so expressed. If the underwriters in fact intended that this question should carry the meaning which they now suggest, nothing would have been easier than to say so. If they did not mean it, I am at a loss to understand how it comes about that the point is taken at all. In my judgment, the meaning of this question is perfectly clear, and there is no evidence on the facts of this case that the particular plank which was the cause of this accident was not in good order and condition at the time when the question was answered, or, indeed, that it was in the possession of the respondents at all. I should add that ASQUITH, J., construed the words " and otherwise in good order and condition " as referring to some condition of the plant *ejusdem generis* with fencing and guarding, and accordingly held that the question did not apply in any case to the condition of scaffolding materials such as those with which we have to deal here. We have not heard counsel for the respondents, and, accordingly, I need say no more about that particular view of the judge than that it is one which, at first sight, appears to me to be difficult to support. It would not be right to say more about it, in view of the fact that we have not heard argument upon it.

I now come to the really important point in the case, which arises on the true construction of a series of clauses described in the policy as " conditions," the observance of which is said to be a condition precedent to the liability of the underwriters. I do not pause to inquire whether the word " condition " and the words " condition precedent " are accurate, and, if I refer to this as a " condition," it is without prejudice to that question. The particular condition which is in issue here is in the following terms :

> The assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations.

In approaching the construction of that condition, it is important to remember the context in which it is found. A duty to take care is a duty which arises by virtue of the relationship between the person on whom such a duty lies and the person towards whom it is to be discharged. That relationship may arise by contract, or it may arise by mere operation of law, by reason of the fact that two persons are thrown into a particular relationship with one another. In the present case, the duty that this condition purports to impose is a contractual duty imposed on the insured towards the underwriters, who are indemnifying the insured against a variety of risks, a very important proportion of which arises in cases of negligence either by the insured himself or by persons for whose negligence he is vicariously responsible to his employees. Of course, in the many classes of risks which are covered, there are some, and no doubt very important ones, in respect of which a workman can recover from the employer without the necessity of establishing negligence. On the other hand, there are a multitude of risks covered in which the workman must establish negligence if he is to succeed. One of those risks, of course, is the risk of accident to a workman from some act or default of an employee of the assured where, but for the Employers' Liability Act, 1880, common employment would have afforded a good defence. The argument which was presented to us with great skill and ingenuity by counsel for the appellants was based on the contention that the condition in question is imposing upon the insured a duty to take care co-terminous with, and similar in quality to, the obligation to take care which lies upon the employer *vis a-vis* his workmen. In my judgment, that is the wrong method of approach to this question. The effect of the argument of counsel for the appellants would be to exclude from the scope of the indemnity which the policy purports at the outset to give a very large and important class of case which in the body of the policy is expressed to fall within it. It is perfectly true that the document must be read as a whole, and that wide and comprehensive words of obligation imposed on the underwriter in the body of the policy may be cut down by subsequent clauses in the document, but, quite apart from any question of repugnancy—and I very much doubt whether that word is really applicable in this case—I consider that a policy of this kind is not to be approached with the idea that a large part of the benefit of the insurance, which any employers would obviously wish to get, and which is at the outset given in wide terms, is going to be eliminated by a thing called a " condition " tucked away at the end of the policy in the context in which this condition is found. Be it observed that the other conditions are all matters of comparatively minor importance. Condition 1 deals with the necessity of giving notice. Condition 2 deals with the question of employers making payments or admissions of liability and so forth, and gives power to the underwriters to use the name of the employer. Condition 3 is in connection with the fixing of the premium. Condition 4 excludes from indemnity employees in the employ of sub-contractors, and then, according to the argument presented to us, condition 5 cuts down the operative and main words of the policy to a surprising extent. I approach a document of this kind, and, I think, properly approach it, with a strong desire to avoid such a result if the language used legitimately permits of it. If the construction which is urged on behalf of the underwriters is the right one, I do not think that it would be an exaggeration to say that this document is really a trap for the insured. In using that expression, let it not be thought for one moment that I use it as implying that a trap is intentionally set. I mean nothing of the kind. All I mean is that, if the intention of the underwriters was to limit their risk in the way in which counsel for the appellants would have it limited, they have used language which entirely fails to make that intention clear. I cannot help thinking that, if underwriters wish, by some qualification, to limit a risk which, *prima facie*, they are undertaking in plain terms, they should make it perfectly clear what that qualification is. They should make up their minds, with competent advice, as to the qualifications they wish to impose, and they should express their intention, with competent advice, in language appropriate to achieve the result desired. There is no justification for underwriters who carry on a widespread business and make use of printed forms either failing to make up their minds as to what they mean or, if they have made up their minds as to what they mean, expressing it in language of this character. It is perfectly possible for any competent draftsman to carry out the intention which counsel for the appellants imputes to the document if that was really intended, and it ought to have been done.

Having said that—and I should be happy to think that these policies would, in the future, be more carefully drafted—I turn to what appears to me to be the short answer to the point. On the facts of the present case, it would appear that the insured, a limited company, employed a foreman who was obviously a competent and skilled man, and who was reasonably and rightly relied upon by his employers. They employed him, not merely to see that the company was provided with appropriate scaffolding material, but also to select from the stock in hand at any moment material which would be suitable for any particular job. It is conceded by counsel for the appellants—and quite rightly conceded in my view—that, in entrusting to this foreman the task of providing suitable and safe material for scaffolding and selecting suitable material for a particular job, the employers were taking a reasonable precaution within the meaning of condition 5. No doubt, *vis-a-vis* a workman injured through the negligence of the foreman, that would not be a sufficient answer to a claim. However, this seems to me to be irrelevant, because the question we have to answer is: "What is meant by a 'reasonable precaution' in this particular document and as between these two parties?" Counsel for the appellants, having conceded what I have mentioned, then wished to construe the condition as importing the element of what, for shortness, I have called vicarious responsibility. He says that, notwithstanding that the selection of a competent foreman for the purposes stated is the taking of reasonable precautions, the employers are in breach of the condition if that foreman is in fact negligent in carrying out the task entrusted to him, or, in other words, that the condition has the effect, so to speak, of imposing upon the assured the burden of a guarantee of the diligence of the foreman in the performance of the task which they have reasonably entrusted to him. That seems to me to be completely inadmissible. If the delegation was reasonable, and, if, in selecting that particular foreman to perform the task, the respondents took reasonable precautions, their obligation under this condition was, in my opinion, at an end. It is inconsistent to say that A the delegation is reasonable and at the same time to say that negligence on the part of the delegate deprives the employer of the benefit of the policy under this condition. Counsel for the appellants says that, unless that construction is put upon the condition, it is wholly valueless. I must confess that I entirely disagree. It seems to me that there is ample B scope for the operation of the condition construed in the way in which I would construe it, and, what is more, a scope which gives every reasonable business protection. The fallacy (if, with respect to counsel for the appellants, I may use that expression) seems to me to lie in importing into this condition all the matters which are relevant in considering C liability based on negligence towards the workman. As between employer and workman, of course, particularly in cases which fall under the Employers' Liability Act, 1880, the employer can be liable for negligence in law, not only by a personal default of his own, but also by the negligence of a fellow-employee. I see no reason at all, however, D for importing that conception into the obligation which the insured undertakes towards the underwriters by this condition. It seems to me that the language is perfectly satisfied by the taking of such reasonable precautions as, on any given set of facts, would satisfy a test of reasonableness as between the insured and the underwriters. As I E have said, it is eminently reasonable for employers to entrust the tasks to which I have referred to a skilled and trusted foreman on whose competence they have every reason to rely. That being so, I need not go into any matters beyond the actual facts of this case.

It will be seen that my method of approach to the problem is not quite F the same as that followed by the judge. He did not, I think, refer to the matter to which I have referred—namely, the relationship of insured and underwriter as bearing on the meaning of such a condition as this—but the result to which he came is the same. In consequence, the appeal, in my opinion, should be dismissed with costs. G

GODDARD, L.J.: I agree. Upon the point arising on the proposal form, it is unnecessary for me to add anything to that which has fallen from LORD GREENE, M.R. A perfectly simple question is asked—namely, whether the machinery and plant is in good condition—and the H answer is: "Yes, it is." It is simply unarguable to maintain that that refers to the future. I agree with LORD GREENE, M.R., that one cannot take the same view as ASQUITH, J., that, in applying the rule of construction sometimes called the *ejusdem generis* rule to the words "otherwise in good order and condition," he had, as he seems to have thought, to construe those words as having reference to fencing and guarding.

I do not see any reason for that. However, the contention raised by the appellants on the proposal form entirely fails on the other point.

I desire to add a few words with regard to this condition. The first thing to notice is that the policy insures the insured, amongst other things, against his common law liability for negligence—that is to say, his personal negligence—and also insures him against what has been called vicarious negligence—that is to say, the negligence of his servants. The condition is in these words :

> The assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations.

I leave out of account the words "and to comply with all statutory obligations," because they are put in a category by themselves, and consider it from the point of view that the condition had simply said : "The assured shall take reasonable precautions to prevent accidents." If we were to read that condition in the way in which counsel for the appellants has invited us to read it, it seems to me that it would follow that the underwriters were saying, "I will insure you against your liability for negligence on condition that you are not negligent," because, if the employer has taken all reasonable precautions to prevent accidents, it follows that he cannot be liable in negligence. Of course, the fallacy which underlies this contention is that we are here construing words in a contract between an underwriter and an insured, and not words in a contract between an employer and employed. I do not entirely agree with the reasoning of ASQUITH, J., in this case, nor do I agree with all the *dicta* of BRANSON, J., in *Concrete, Ltd.* v. *Attenborough* (1), to which we have been referred. I think that, as soon as one remembers that what has to be construed is a contract between the insurers and the insured, things become reasonably clear. It is a condition which is put in for the protection of the underwriter, or perhaps one might say to limit the field of the underwriter's liability to the extent that he is saying : "I will insure you against the consequences of your negligence, but understand that I am insuring you on the footing that you are not to regard yourself, because you are insured, as free to carry on your business in a reckless manner. You are to take those reasonable precautions to prevent accidents which ordinary business people take. That is to say, you are to run your business in the ordinary way, and not in a way which invites accidents." If you found that an employer whose premises had dark entries, tunnels and what not provided no lights, or failed to provide lights where there were stairs which could not be seen in the dark, or failed to provide fencing along places where, if there were no fencing, it would be reasonable to suppose many people would fall over, or if in his business he used explosives or dangerous acids, and so forth, and left the explosives about where any youth who was employed on the place could tamper with them and cause damage and destruction, I think that it could be said that he was not taking reasonable precautions to prevent accidents. In my opinion, it is quite fallacious to read this clause as meaning that, if the employer is guilty of any breach of duty which the law imposes as between employer and employed in not taking some precaution which a jury or a court might think ought to have been taken, so that a liability rests upon the employer for negligence, that is to be a ground for the underwriter saying, "I am not liable to indemnify you," because that would be granting an indemnity with one hand and taking it away with the other. I think that a perfectly satisfactory meaning can be given to this condition if one approaches it by saying that it occurs in an undertaking between underwriter and insured, and, in my opinion, it ought not to be construed in the way for which the appellants contend in this case. For these reasons, although they are not quite the same as those on which Asquith, J., proceeded, I agree that this appeal should fail.

du Parcq, L.J.: I agree, and, as we are told that condition 5 is similar to conditions in many other policies, I should like to say a very few words about it. For myself, although I do not think that I disagree in this respect with Lord Greene, M.R., or with Goddard, L.J., I think that there is no complaint to be made about this condition. It seems to me to be plain and not to present any serious difficulty. What is a legitimate ground for complaint, I think, is that it should be sought to make it mean something which, on the face of it, it does not mean at all. It appears to me that any business man reading this condition would understand that he, the insured, must take reasonable precautions. In the present case, the insured—I leave out of account for the moment the fact that the insured is a company, as the principle is the same as if it were an individual—says: "I have taken all reasonable precautions. I selected, so far as the present complaint is concerned, an admittedly competent and experienced man to choose the materials for the work. I never stinted him or refused any application he made to me for materials. I supplied him, as far as I could, with what was necessary, and I left the task of selection to him, he being much more fitted to do it than I am myself." That seems to be a complete and satisfactory answer. Then, however, it is said: "Unfortunately, the competent man whom you employed was on one occasion negligent, and you are vicariously responsible for his negligence, and, as he omitted a reasonable precaution in carrying on your business and in providing for the safety of your workmen, therefore you must be said not to have taken a reasonable precaution as between yourself and the insurer." I agree that that argument rests on a complete misconception. The insured never warranted that everybody he employed would take reasonable precautions, or, indeed, that anybody except himself would take reasonable precautions, and he himself has taken reasonable precautions. It is not right, in my opinion, to say that he had delegated to another the duty which he owes to the insurers. Indeed, I think that in its nature that is a duty which he cannot delegate, and, when he appointed another person to see that provision was made for the safety of his workmen, he was not delegating his duty of taking reasonable precautions. He was performing it. On these grounds, I agree with the conclusion at which the judge arrived, although I think that he might have arrived at it perhaps by a simpler and more satisfactory road.

Appeal dismissed with costs.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellants); *Brown, Turner, Compton Carr & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re ROYAL MUTUAL BENEFIT BUILDING SOCIETY'S APPLICATION.

[Chancery Division (Uthwatt, J.), **October 21, 1941.**]

Emergency Legislation — Application by corporate body — Application by solicitor—Solicitor not validly appointed.

A mortgagor respondent to a summons taken out by the mortgagees under the Courts (Emergency Powers) Acts, 1939 and 1940, for leave to proceed may raise an objection in those proceedings that the mortgagees' solicitor was not validly appointed.

[**EDITORIAL NOTE.** For certain purposes the internal regulations of companies and similar bodies do not concern third parties and it is assumed that they have been duly observed unless the contrary appears on the face of the proceedings or document in question. Where proceedings are brought on behalf of a corporate body by its solicitor, it is clear that they are not the proceedings of the body unless the solicitor has been duly appointed, and this principle is held to extend to the case where the proceedings are purely procedural, as is the case with proceedings under the Courts (Emergency Powers) Act, 1939.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 946-950.]

Motion by the respondent mortgagors, the Saltdean Estate Co., Ltd., that the name of the applicants, the Royal Mutual Benefit Building Society, be struck out of a summons, dated Aug. 29, 1941. The mortgagees, the Royal Mutual Benefit Building Society, by an originating summons, dated Aug. 29, 1941, applied for leave to proceed to exercise any powers against the mortgagors, the Saltdean Estate Co., Ltd., which might be available to them by way of taking possession or appointing a receiver of the properties comprised in the mortgages, transfers of mortgages and legal charges. At the annual general meeting of the building society on Mar. 20, 1941, three directors were appointed in place of the existing directors. By an affidavit dated Oct. 10, 1941, W. C. Turner, a director of the mortgagor company and a member of the mortgagee building society, stated that the proceedings at the meeting were out of order, and that the directors were not, therefore, validly appointed. The mortgagor company raised the question in the proceedings under the summons that the mortgagees' solicitor was not validly appointed, on the grounds of the invalidity of the appointment of the directors of the mortgagee building society, and that the solicitor, therefore, had received no proper instructions.

G. H. Newsom for the applicants, the mortgagees.

G. Russo (for *E. Bagshawe* on war service) for the respondents, the mortgagors.

UTHWATT, J.: The question which I have to decide in this case is whether it is open to a mortgagor respondent to a summons taken out by mortgagees for the purpose of the Courts (Emergency Powers) Act, 1939, to question in those proceedings the validity of the appointment of the mortgagees' solicitor to act in the action, on the ground that the directors of the mortgagees, the building society, were not validly appointed, and, therefore, that the solicitor obtained no proper instructions. That is the assumption of fact which I am making for the purpose of the decision. It is quite true that the Courts (Emergency Powers) Act, 1939, is directed only to certain procedural matters. The Act itself places a bar upon the exercise of rights to which the mortgagees are otherwise entitled. The point of the application of the mortgagees is to have that bar removed. In substance, the objection is this: "You, the mortgagees, have not made the application." That is the substantive objection in this case. Is it open to the mortgagors to take it? In my opinion, it is. There is no more reason why they should be harassed by proceedings not properly authorised where those proceedings are, as I think, of a merely procedural character than there is that they should be harassed where the proceedings are really substantive and effective. Thus, upon the formal matter whether or not it is open to the respondents in these cases to challenge the authority of the solicitor to act on behalf of the mortgagees (because that is what it comes to), I am of opinion that the matter can be raised on the summons in some form or other.

Solicitors: *Francis Coningsby & Co.* (for the applicants); *D. Woodward Davey* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re BEST'S MARRIAGE SETTLEMENT, BELK *v.* BEST AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), **October 17, 20, 21, 22, 23, 24, 27, 1941.**]

Rentcharges and Annuities—Settlement—Free of all deductions—Right to deduct income tax.

By a settlement dated Sept. 25, 1935, the settlor covenanted with the trustees that after his death his personal representatives should pay his wife " such a sum as shall after all deductions amount to £300 per annum." The trustees asked whether the word " deductions " included income tax. It was contended on behalf of the widow that part of a conveyancing phrase which was commonly used to escape the provisions of the Income Tax Act, 1918, All Schedules Rules, had been used, or, alternatively, that, if the word " deductions " did not include income tax, it had no meaning at all :—

HELD : the trustees were entitled to deduct income tax when paying the annuity for the following reasons : (*a*) there was no indication in the context that the word " deductions " should include income tax, (*b*) only half the conveyancing phrase had been used, and, unless the whole phrase were used, no intention to deduct tax could be inferred, (*c*) there were other expenses which would be covered by the term " deductions," such as those occasioned by any realisation of capital as authorised by the settlement to make up the annual sum.

[**EDITORIAL NOTE.** It has long been thought the general rule that the words " free of all deductions " were not sufficient to save the beneficiary from the burden of income tax, and, in deciding this case, the judge has stated that as a recognised general rule and has explained the decision in *Re Cowlishaw* (3) as one in which a different conclusion was reached by reason of the context in which those words were found. The importance of the present decision, therefore, is the explanation of the decision in *Re Cowlishaw* (3) and the statement of the limited extent to which that decision has affected the general rule established by many earlier decisions.

AS TO GIFTS FREE OF ALL DEDUCTIONS, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214, 215, para. 386 ; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to :

(1) *Re Loveless, Farrer* v. *Loveless,* [1918] 2 Ch. 1 ; 39 Digest 167, *585* ; 87 L.J.Ch. 461 ; 119 L.T. 24.

(2) *Re Shrewsbury Estate Acts, Shrewsbury* v. *Shrewsbury,* [1924] 1 Ch. 315 ; 39 Digest 167, *586* ; 93 L.J.Ch. 171 ; 130 L.T. 238.

(3) *Re Cowlishaw, Cowlishaw* v. *Cowlishaw,* [1939] Ch. 654 ; Digest Supp. ; 108 L.J.Ch. 196 ; 160 L.T. 455.

ADJOURNED SUMMONS to determine the construction of the term " deductions " in a settlement dated Sept. 25, 1935. The facts are fully set out in the judgment.

Hubert Rose for the plaintiffs.

Harold Lightman for the first defendant.

R. Goff for the second and third defendants.

BENNETT, J. : The question which the summons asks arises on a marriage settlement made in 1935 upon the occasion of the marriage of one Best with a lady named Amos who at the time of the marriage was a widow. By the settlement, Best covenanted with the trustees of the settlement that, if, as the case was, the marriage should be solemnised and the wife should survive him, his personal representatives would, within six months after his death, pay to the trustees the sum of £5,000 sterling (free from duties), with interest thereon at the rate of £4 per cent. per annum from his death until payment. That sum has been paid, as I understand it, by the personal representatives of the covenantor to the trustees, and the provisions contained in cl. 2 of the settlement have come into operation. The covenantor's wife having survived him, it is these provisions which have given rise to the question which is asked by the summons. I will read the clause *verbatim* :

> The trustees shall hold the said sum of £5,000 when received and the said interest thereon and the investments thereof (hereinafter called the trust fund) upon the trusts following : (1) Upon trust until the death or remarriage of the wife whichever shall first happen to pay to the wife out of the income of the trust fund for the time being and by sale from time to time of such part of the investments comprising the trust fund as shall be necessary until the trust fund shall be exhausted such a sum as shall after all deductions amount to £300 per annum by equal half-yearly payments the first of such half-yearly payments to be made at the expiration of six months from the death of the husband. (2) From and after the death or remarriage of the wife whichever shall first happen upon trust for the husband or his personal representatives absolutely.

The question asked is as follows :

> Whether on the true construction of the said settlement and in the events which have happened the defendant Lilian Florence Best is entitled, until her death or remarriage or until the trust fund comprised in the said settlement shall have been exhausted, to be paid out of the income, and, so far as such income shall be insufficient, out of the capital, of the said trust fund : (1) Such a gross annual sum as after deduction of the income tax to which she is for the time being assessable, when computed in relation to all reliefs and allowances to which she is for the time being entitled, will leave in her hands a clear annual sum of £300, or (2) such a gross annual sum as will leave in her hands a clear annual sum of £300 after deduction from such gross annual sum of income tax at the standard rate for the time being in force, or (3) a gross annual sum of £300, not clear of any deduction of income tax.

The answer to this question depends upon the meaning of the word " deductions " in the context in which that word is found in cl. 2 (1) of the indenture of settlement. It is well-established, I think, that in testamentary instruments a provision for the payment of a yearly sum free of all deductions or of a clear yearly sum of some fixed amount does not free the person in whose favour a gift in those terms is made from having to pay the income tax which is attracted by the gift. The case which is now most often relied upon as establishing that proposition is *Re Loveless, Farrer* v. *Loveless* (1). The question is whether in the present instrument there is a context which enables the court to say that the language of cl. 2 is language which leads to the conclusion that, when the parties to the instrument used the term " deductions," they intended that term to extend to and include income tax. I think that counsel for the second and third defendants is right in his submission that, before the court can construe the word " deductions " as extending to income tax, it must find some positive indication that the word was used with the intention that it should extend to and include income

tax, it being the view which has been held for some time past that
the income tax which the payer of an annuity withholds when he makes
payment to the annuitant is not technically a "deduction." There
are cases in which there is a context which enables the court to conclude
A that, when the word "deductions" was used, the user of the word
intended it to extend to and include the income tax. *Re Shrewsbury
Estate Acts*, *Shrewsbury* v. *Shreswbury* (2) was such a case, and there is a
decision of my own in *Re Cowlishaw*, *Cowlishaw* v. *Cowlishaw* (3), where
I came to the conclusion that, upon the construction of the will which
B fell to be considered there, there was a context which forced me to the
conclusion that that testator had intended to include income tax
in the direction that an annuity was to be paid "free of all deductions,"
the context which led me to that conclusion being the direction which
preceded the words "to be paid free of all deductions" that the annuity
C in question was to be paid "free of all duties." It is not for me to say
whether that decision was right or wrong, but it was upon that context
that I reached the conclusion which I did reach. The question here
is whether there is any context which enables the court to reach the
conclusion that in the present deed it was the intention of the parties
D to include income tax in the word "deductions." The first suggestion
is that the conclusion should be reached because in the instrument there
has been used part of a phrase commonly used by conveyancers when
they wish to escape from the provisions to be found in the Income Tax
Act, 1918, All Schedules Rules. The answer to that argument is that
E only part of the customary phrase has been used, and not the whole
of it, and, unless the whole of it has been used, it is impossible, I think
to conclude that there was in the minds of the parties the intention
to free the annuity from the payment of income tax. The second
argument is that the word is meaningless and idle unless it is held to
F include income tax. In my judgment, that is not necessarily so in the
present case, because the annual payment is to be made, not merely
out of the income of the fund, but also out of the capital of the fund
until the capital shall be exhausted if the income is insufficient. That
provision may involve periodical realisation of capital and the incurring
G of expense in connection with that realisation, which, apart from the
use of the words "all deductions," might have been thought an expense
which should have been borne by the annuitant. In other words, it
might have been said that the annual periodical cost of realising capital
to discharge the annuity was an expense which should have been deducted
H from the sum to be paid here unless the word "deductions" had been
found in the clause which fell to be construed. Thus I think that I am
bound to reject that argument, and, it being possible to put some
meaning upon the word "deductions," the authorities, I think, are such
that I am bound to hold that, upon the true construction of this sentence, the duty of the trustees, when they pay this annuity, is to
deduct from it such income tax as is indicated by the authorities.

Declaration that trustees should deduct income tax when paying the annuity. Costs as between solicitor and client to come out of the trust fund.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Belk & Smith*, Middlesbrough (for the plaintiffs and for the first defendant); *Maples, Teesdale & Co.* (for the second and third defendants). A

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

R. *v.* HAMMOND.

[Court of Criminal Appeal (Viscount Caldecote, L.C.J., and Humphreys and Lewis, JJ.), **October 27, 1941.**]

Criminal Law—Trial—Objection to admissibility of evidence—Time when objection should be taken. C

At the trial of the appellant for murder, counsel for the prosecution stated at the opening of the case that he wished to put in evidence a confession of the murder which the appellant contended was not a voluntary statement. The jury were sent out, and counsel for the prosecution asked the appellant whether it was true that this statement D was not a voluntary one, and, on the appellant's answering in the affirmative, counsel then asked him whether the statement itself was true, and the appellant answered this also in the affirmative. For the appellant, it was contended that this question as to the truth of the statement was inadmissible:—

Held: (i) the question was admissible, as it went to the credit of E the person making the statement.

(ii) it was a general, though not an absolute, rule of practice that arguments as to the admissibility of evidence should be heard at the time when such evidence was tendered, and not at the opening of the case, and it was a rule which should be adhered to in most cases.

[**EDITORIAL NOTE.** An objection to the admissibility of evidence in a trial F before a jury necessarily introduces a difficulty, because the argument as to the admissibility of the evidence must necessarily take place in the absence of the jury. The court has, however, confirmed the rule that such an objection should not be taken until the time arrives for tendering the evidence to which objection is taken, and its admissibility should not be decided as a preliminary matter.

As to Time for Objection to Admissibility of Evidence, see DIGEST, G Vol. 14, p. 274, No. 2840.]

Case referred to:

(1) *R.* v. *Cole* (1941), 165 L.T. 125; Digest Supp.

Application for leave to appeal from a conviction of murder before H Cassels, J., at the Central Criminal Court. The facts are fully set out in the judgment.

B. H. Waddy for the appellant.

G. B. McClure for the Crown.

Humphreys, J. [delivering the judgment of the court]: The appellant was convicted at the Central Criminal Court of the murder of George Thomas Roberts. He is now applying for leave to appeal against that conviction. The facts are that on July 3, 1941, some person with a hatchet attacked and murdered Roberts, who was the manager of a cinema at Dover, where the appellant, amongst a number of other people, was employed in a minor capacity. The person who committed that murder also robbed the safe of a considerable sum of money. Roberts lived on the cinema premises, or was sleeping there at the time, and the police inquiries were at once narrowed to the question of which of the persons who had inside knowledge of that building was the one who had committed this crime, because it was clearly not a crime which had been committed from the outside. There was no breaking in. Some person knew the place, and had secreted himself on the premises and murdered this unfortunate man.

The appellant, amongst others, was questioned, and on July 8, 1941, five days after the murder, he gave a long and detailed statement as to his movements on that evening. The police checked up on his statement, and, while they were not in a position to show that any of the statements as to the places to which he had been, or the streets through which he had walked, were untrue, because it was merely a story of a stroll through the streets of Dover, they did find that the time which was occupied by that perambulation of his was quite wrongly stated, for, if his story were true, he would have arrived at the Midland Bank, where he ought to have been, as he was a fire-watcher there at night, by 11 p.m., whereas he did not arrive there till 11.30 p.m. That being so, the police asked him to come to the police station on July 21 to see if he could give them some further assistance.

According to the evidence of the police, and, indeed, according to the appellant's own statement, the interview began with three senior police officers present. They were a superintendent of police, a detective-inspector of police and a sergeant of police, all members of the Criminal Investigation Department. The first thing said to the appellant was:

> We have checked up on your statement as to where you were on the night of July 3, and we find that the times do not agree, because you could not have taken, however slowly you walked, more than a certain number of minutes over that route which you have detailed to us, and we find you took at least half-an-hour longer than that. Can you give us any further information? Is there any place you went to which you omitted to mention?

That was the object of the inquiry. The result, according to the three police officers, was a very prolonged wait, and, at the end of several minutes, the accused said: "Well, I have been thinking it over." He made some other observation and then said: "I will tell you one or two things." Then gradually, with a great many long pauses, he told in great detail the story of how he had committed the crime, and he added a number of matters which were entirely unknown to the police, and which were proved to be unknown to the police. for they included such matters as that he had taken part of the money from the safe and had hidden it in places to which the police had not been, and, after that statement, the police went to those places and there found the money which the accused said that he had hidden.

That was the principal evidence against the accused when he was put on his trial. Counsel for the prosecution had started his opening, had stated a few facts to the jury, and was proposing to open to the jury the circumstances in which this complete confession had been made by the accused, when counsel for the defence informed him that there would be an objection to the admissibility of the confession. The ordinary practice in such a case, if there is any objection on the part of counsel for the defence to the admissibility of a piece of evidence, is that he should inform the prosecution of that fact beforehand, and that that piece of evidence should not be opened to the jury. This court desires to reiterate that what was said by this court in *R.* v. *Cole* (1) is a good practice which should be adhered to, certainly in most cases. The court cannot lay down as a rule of practice that in no case should the judge decide to hear in advance arguments as to the admissibility of evidence. There may be cases in which it is convenient, and in which it cannot possibly result in any harm in its being done. The rule stands, however, that in most cases the ordinary rule should be adhered to, and in this case there is no question but that it would have been very much better if it had been followed. Counsel for the prosecution could have opened the facts as to the murder, and various other matters, medical evidence and so forth, and then simply have told the jury that there was some other vital evidence which he was not in a position to mention to them at the moment, but that it would be tendered in evidence at the proper time.

The jury were sent away with the consent of counsel for the defence, and the question was argued before the judge on evidence which was properly called. The three police officers gave evidence as to the completely voluntary nature of the statement, and as to its being a statement which was not even the result of questions being put but was just what the man wanted to say, and nothing more. The accused then went into the witness-box and gave a story to the judge, who, for this purpose, was the tribunal of fact as well as law, having to decide whether or not this was a voluntary statement. The accused said that he had been knocked about and brutally ill-treated, that his arms had been twisted and his face slapped, and that the confession had been extorted from him by what everybody would agree, if it took place, was most abominable conduct on the part of these three senior officers, which would clearly render the statement inadmissible. He was then cross-examined by counsel, and this court accepts counsel's statement that he had not the least idea, when he began to cross-examine the accused, that, if the man was asked the question, he would confess to the crime. The first question—in our view, a perfectly natural question to put—was;

> Your case is that this statement was not made voluntarily ?—Yes.
> Is it true ?

Then, no doubt to the surprise of counsel, the answer was : " Yes, sir." Then two or three times in two or three different ways counsel put questions to the witness to make quite sure that he really meant that the confession was true, that he was not referring to the previous statement, and that there was no mistake about the matter. Finally, the accused was asked :

> What you are now saying is that you were forced into saying what was true by something that was done. Is that right ?—Yes, sir.
> So you did kill Mr. Roberts ?—Yes, sir.

Naturally, after that, counsel put no more questions.

Then the jury, not knowing anything of that which happened while they were out of court, had this statement, this confession, read to them as part of the case for the prosecution, and the accused did not take the opportunity of going into the witness-box. That, of course, we know was natural, now that we know that, if he had gone into the witness-box, he would have had to face the confession. Therefore, the jury convicted the accused, as they were bound to do on the evidence.

This appeal is brought on the sole ground that the question which was put by counsel for the prosecution in cross-examination of the accused was inadmissible. In our view, it clearly was not inadmissible. It was a perfectly natural question to put to a person, and was relevant to the issue of whether the story which he was then telling of being attacked and ill-used by the police was true or false. It may be put as it was put by VISCOUNT CALDECOTE, L.C.J., in the early part of the argument of counsel for the appellant, that it surely must be admissible, and in our view is admissible, because it went to the credit of the person who was giving evidence. If a man says, " I was forced to tell the story. I was made to say this, that and the other," it must be relevant to know whether he was made to tell the truth, or whether he was made to say a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement, and, therefore, the questions which were put were properly put. They were admissible, and they could not, therefore, have wrongly affected the mind of the judge.

However, the facts of this case go even beyond that, for it is clear from the statement made by CASSELS, J., the presiding judge, that he did not decide on the admissibility of this confession as the result of the admission of the witness that it was a true confession. He had himself some doubt as to whether or not the question as to its truth was a desirable question to put, and he said :

> I had almost said that it was unnecessary to put the statement in detail. I have listened to everything the prisoner had to say in his evidence-in-chief. I hold that this statement is a voluntary statement and admissible in evidence.

In this case, we cannot entertain the smallest doubt that the accused was rightly convicted of this crime upon evidence which was properly before the jury. Further, we are satisfied that the evidence of his confession of the crime was rightly admitted in evidence by the judge, who was in no way misled by anything which took place. The application is refused.

Application refused.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

ALLCHIN *v.* COULTHARD (TREASURER OF THE COUNTY BOROUGH OF SOUTH SHIELDS).

[KING'S BENCH DIVISION (Lawrence, J.), **October 6, 7, 13, 1941.**]

Income Tax—Local authority—Retention of tax deducted from interest payment—Separate undertakings—Whether excess of taxed income in one account can be set out against excess of interest payments in another account—South Shields Corporation Act, 1935 (*c. xcvi*), *ss.* 112-115.

By the South Shields Corporation Act, 1935, s. 112, all the receipts of the borough were carried into the general rate fund, out of which all its liabilities were discharged. Section 113 of that Act required the corporation to keep separate accounts for its various undertakings, and sects. 114 and 115 of the same Act enabled the corporation to apply from the rate fund to specified purposes in connection with its undertakings a sum not exceeding the excess revenue, if any, earned by that undertaking. The accounts of the corporation for the year 1935-1936 showed that, in the case of the electricity and transport undertakings, the taxed income exceeded the amount of the interest payments and, in the case of the housing account, the taxed income was considerably less than the interest payments. Upon making the interest payments, income tax had been deducted and retained by the corporation and, in so far as the interest payments had been made out of the taxed income, the corporation would not have to account to the Inland Revenue for the sum retained. The corporation contended that, in the case of the housing account, in so far as the taxed income in that account was insufficient to meet the interest payments in respect of that account it was entitled to say that such interest payments were made out of the excess of taxed income in the electricity and transport accounts, and supported this contention by the fact that all receipts had to be brought into the general rate fund, from which alone payments could be made :—

HELD : on the proper construction of sect. 114, the corporation was not entitled to apply any part of the revenue arising upon one undertaking to make up a deficit upon another. Therefore the corporation was not entitled to say that the interest payments in respect of the housing account had been paid as to part out of the taxed income of the electricity and transport undertakings.

[**EDITORIAL NOTE** This matter is one of some complication. Interest payments are required to be made with deduction of tax, the amount of the tax being retained by the person paying the annual interest. The amount so retained *prima facie* belongs to the Inland Revenue, but, if it can be shown by the payer that he has paid the interest out of his taxed income—this is sometimes spoken of as income brought into charge—then he retains the sums deducted as his own money. If that were not so, he would be paying tax twice over on the same income. In this case the accounts make it clear that, in the case of the electricity and transport undertakings, it could not be contended otherwise than that the interest had been paid out of taxed income. In the case of the housing account, there was insufficient taxed income from which the interest payments could have been made, but the corporation argued that, as it only had statutory authority to make a payment out of the general rate fund and all receipts had to be brought into that fund, the interest was paid out of taxed income up to the amount of the whole of the taxed income. The Inland Revenue, however, contended that each account must be treated separately and that, in so far as there was insufficient taxed income in the housing account, the interest payments made in respect of that account had not been paid out of taxed income, and this contention was successful, the judge holding that, upon the proper construction of the local Act, the accounts of each undertaking must be treated separately.

As to Payment out of Taxed Income, see HALSBURY, Hailsham Edn., Vol. 17, p. 138, para. 277; and for Cases, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397.]

Case referred to:

(1) *Sugden* v. *Leeds Corpn.*, [1914] A.C. 483; 28 Digest 74, *397*; 83 L.J.K.B. 840; 108 L.T. 578; 6 Tax Cas. 211.

Case Stated under the Income Tax Act, 1918, s. 149 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The South Shields Corporation in the year 1935-1936 paid interest on borrowed money amounting to £132,396, and, on making such payments, deducted income tax. In the same year, the total taxed income of the corporation amounted to £91,504. The latter amount included the profits of the corporation's electricity and transport undertakings, which, after deducting interest on moneys borrowed, amounted to £15,217. All the receipts of the corporation were, according to law, carried into the general rate fund, from which all its liabilities were discharged. The South Shields Corporation Act, 1935, provides as follows:

> 112. (1) Notwithstanding anything contained in any other Act or order, all moneys received by the corporation whether on capital or revenue account including (but without prejudice to the generality of this provision) (*a*) all money received on account of the revenue of any of the corporation undertakings; and (*b*) interest and other annual proceeds received on the investments forming part of any fund accumulated for the redemption of debt or working capital or as a reserve renewals repairs depreciation contingency insurance consolidated loans capital reserve or other similar fund (including any interest payable to any such fund in pursuance of the section of this Act of which the marginal note is " Use of moneys forming part of sinking and other funds ") shall be carried to and form part of the general rate fund and all payments and expenses made and incurred by the corporation in respect of any such undertaking or in carrying into execution the powers and provisions of this or any other Act whether public or local (including interest on moneys borrowed by the corporation and all sums required by law to be paid or transferred or which the corporation may determine to pay or transfer to any such fund as is referred to in para. (*b*) of this subsection) shall be paid or transferred out of the general rate fund provided that an amount equivalent to the interest and other annual proceeds as aforesaid shall (subject in the case of any of the said funds to any pre-

scribed limit on the amount thereof) be credited in the accounts of the fund of the investments on which the same is received.

Sect. 113 of the Act requires the corporation to keep separate accounts showing the position of its various undertakings. Sect. 114 provides as follows:

> 114 (1) If in respect of any year the moneys received by the corporation on account of the revenue of any of the Corporation undertakings (including the interest and other annual proceeds received . . . .) shall exceed the moneys expended by the corporation in respect of that undertaking for the several purposes mentioned in paragraphs (*a*) (*b*) (*c*) and (*d*) of sub-section (1) of the section of this Act of which the marginal note is "Accounts" the corporation may in respect of that year (if they think fit but subject to the provisions hereinafter contained) apply out of the general rate fund a sum not exceeding the amount of such excess to any of the following purposes
> (a) In the reduction of capital moneys borrowed for the purposes of the undertaking;
> (b) In the renewal and . . . . the construction, extension or improvement of any works and conveniences for the purposes of the undertaking;
> (c) In providing a reserve fund in respect of the undertaking.

Sect. 115 makes special provision for the application of surplus electricity revenue.

The corporation contended (i) that the whole of the sum of £132,396 was payable out of the general rate fund, (ii) that the general rate fund was a "mixed fund" consisting partly of taxed and partly of untaxed receipts, the taxed receipts being the sum of £91,504, (iii) that it was lawful to pay, as had in fact been done, the interest referred to, to the extent of £91,504 out of the like amount of profits already charged to tax, and that no earmarking of this interest in the corporation accounts against an equivalent amount of taxed profits was necessary to enable the corporation to retain the tax deducted from such interest, and (iv) that the corporation was only assessable to tax on the difference between the interest paid and the taxed receipts—namely, £40,892. On behalf of the Crown, it was contended that the interest could not lawfully be paid, and in fact had not been paid, out of the taxed profits of the corporation to the extent that those taxed profits were dedicated by statute to specific purposes other than the payment of interest, and that the corporation was assessable on £56,109, being the difference between the interest paid and the taxed receipts less the amount of the profit on the electricity and transport undertakings, which last sum was not available for the payment of interest.

The decision of the Special Commissioners was as follows:

> By the South Shields Corporation Act, 1935, s. 112, all the moneys received by the corporation must be carried to and form part of the general rate fund and all payments by the corporation must be made out of the general rate fund. The general rate fund is a "mixed fund" and in making payments of interest out of this "mixed fund" the corporation must be deemed to have paid primarily out of taxed income unless it appears from the evidence that the payments were not in fact paid out of taxed income or could not be so paid because the taxed income had been used for or dedicated to some other purposes.
>
> The applications of money which the corporation is empowered to make under sects. 114 and 115 of the Act of 1935 have to be made out of the general rate fund, but not out of any particular part of it, and the form of the transport and electricity accounts does not, in our opinion, afford evidence that the actual surplus income from these undertakings has been used or earmarked for any specific purposes. We hold, therefore, that the corporation possessed in the general rate fund a taxed

fund of £91,504 out of which it could legally have paid the interest in question, and we further hold that it must be deemed to have paid the interest primarily out of the taxed income. The appeal, therefore, succeeds, and we remit the case to the parties in order that the assessment may be adjusted to the correct sum.

The Crown appealed.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

Sir Patrick Hastings, K.C., J. Millard Tucker, K.C., and *Terence Donovan* for the respondent.

LAWRENCE, J. : This is an appeal by the Crown against the decision of the Special Commissioners holding that the South Shields Corporation are entitled to deduct income tax from payments of interest on their bonds under the Income Tax Act, 1918, All Schedules Rules, r. 19, although the undertaking in respect of which such bonds were issued had not earned profits which had suffered tax sufficient to cover such interest but the corporation had in their general rate fund other profits derived from their other undertakings which had suffered tax.

The corporation seek to apply their excess revenue on their electricity and transport accounts—namely, £12,628 and £2,589—towards the payment of interest on their housing account. I understand it to be common ground between counsel that the real question is whether it was lawful for the corporation to apply the excess revenue arising upon one of their undertakings in payment of interest upon bonds issued for the purposes of another of their undertakings. In any event, in my opinion, that this is the real question results from the decision of the House of Lords in *Sugden* v. *Leeds Corpn.* (1). This question depends upon the construction of the South Shields Corporation Act, 1935, ss. 112, 113, 114.

The corporation contend that, as their only fund is the general rate fund, into which all receipts must go, and out of which all payments must come, they are entitled to apply any sums in that general rate fund towards the payment of any of their interest liabilities, and, therefore, are entitled to apply any sums which have borne tax to the discharge of any of their liabilities. They say, further, that sect. 113 deals only with accounts, and is designed merely to show the financial position of their various undertakings, and that sect. 114 was intended merely to prevent their applying more than the excess arising from their several undertakings for the purposes therein specified.

The Attorney-General, on the other hand, contends that sect. 114 must be read as meaning that the corporation can apply their excess revenue only to the subjects specified in subsect. (1) (*a*), (*b*), (*c*), and that, if they could apply such excess revenue to any of their liabilities, it would have been quite unnecessary to specify the objects mentioned in subsect. (1) (*a*), (*b*), (*c*). He says further that sects. 111-115 all contemplate that the accounts of the various undertakings should be kept most carefully separate and distinct, and that it would be a remarkable construction to put upon sect. 114 if it were to be held that the corporation have power to apply any part of their excess revenue arising upon one undertaking to make up a deficit upon another, and that, if they cannot do that, they cannot apply such excess towards paying liabilities unconnected with the undertaking in question.

It is true that sect. 114 uses the words "may" and "if they think fit," and the corporation must, therefore, have a discretion as to whether they apply their excess revenues to the purposes specified, but I find it difficult to understand why the objects specified in clauses (*a*), (*b*) and (*c*) were mentioned if the corporation have power to apply their excess revenues as they please, and I think that it may very well have been the policy of the legislature that any excess revenue of the corporation's various undertakings, if not applied to the purposes specified, should be retained and so operate in relief of rates. Upon the whole, I have come to the conclusion that the contention of the Crown is correct, and the appeal must be allowed with costs.

It is unnecessary for me to deal with the subsidiary question as to whether in fact the corporation have applied profits which have suffered tax to the payment of the liabilities in question.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Speechly, Mumford & Craig*, agents for *Harold Ayrey*, Town Clerk, South Shields (for the respondent).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

SMART BROTHERS, LTD. *v.* ROSS.

[Chancery Division (Uthwatt, J.), **October 29, 30, 1941.**]

Emergency Legislation—Hire purchase—Determination of agreement by hirer—No pressure by owner—Real bargain—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*) (*ii*).

A hirer under a hire-purchase agreement was unable to continue her payments, and concluded an agreement with the owners whereby the latter could retake possession of the goods the subject of the hire-purchase agreement on the payment to the hirer of £10 in part return of the instalments paid by her. The court was asked to determine whether leave had to be obtained under the Courts (Emergency Powers) Act, 1939, s. (1) (2) (*a*) (*ii*), before the owners could retake possession under the new agreement:—

Held: the leave of the court was not necessary. The new agreement was a genuine bargain between the parties, and was not a means of avoiding the necessity of obtaining leave under the Act.

[**EDITORIAL NOTE.** A hire-purchase agreement in the usual form contains separate and distinct clauses by which it may be determined by either party. The Emergency Legislation only restricts the right of the owner to determine the agreement, but it is possible for the owner by coercive measures to force the hirer to determine the agreement, and it has been held that any such attempt is an infringement of the provisions of the Courts (Emergency Powers) Act, 1939. If it were otherwise, the position would be, in the words of MacKinnon, L.J., in *Bowmaker, Ltd.* v. *Tabor* (2), "that protection ceases for a humble and submissive debtor, and avails only one who is astute and assertive of the benefit given him by this Act." The question in the present case, therefore, was whether the owners had sufficiently safeguarded themselves from any suggestion that any act or word of theirs could be construed as having forced the hirer to seek the determination of the agreement. It being clearly shown that the only matter influencing the debtor was a series of unfortunate happenings which made it impossible for her to pay the sums due under the agreement, and that no pressure had been brought to bear upon her by the owners, the case was one to which the provisions of the Act did not apply.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946.]

Cases referred to:

(1) *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.*, [1940] Ch. 638; [1940] 2 All E.R. 601; Digest Supp.; 109 L.J.Ch. 266; 162 L.T. 372.

(2) *Bowmaker, Ltd.* v. *Tabor*, [1941] 2 All E.R. 72; Digest Supp.

Adjourned Summons to determine whether the leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (*ii*), ought to be obtained. The facts are fully set out in the judgment.

A. A. Pereira for the plaintiffs.

A. C. Longland for the defendant.

Uthwatt, J.: This is a summons taken out by Smart Brothers, Ltd., who in the course of their business let out furniture upon hire-purchase terms, against Miss Sadie Ross, and it asks in substance whether, without obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939, they are at liberty, on the faith of an agreement which has been arrived at recently, to resume possession of furniture comprised in a hire-purchase agreement.

The material facts are these. By an agreement dated Sept. 3, 1938, Smart Brothers, Ltd., who are referred to as the owners, let out certain goods to Miss Ross, who is referred to as the hirer, under a hire-purchase agreement which provided by cl. 1 for an immediate payment of £2 4*s*. as a consideration for the option to purchase subsequently granted by the agreement, and also for monthly instalments of £1 5*s*. in respect of the hire of the goods. Then cl. 2 contained a statement of the terms upon which the hirer would become entitled, as owner, to the goods in question, but until that time the goods were to remain the sole property of the owners. Then there were provisions as to the place where the goods should be kept and as to punctual payment of rates and taxes in respect of the premises where they were kept, and provisions against assignment. Then cl. 6 provided as follows:

> The hirer may terminate the hiring by returning the goods to the owners at the hirer's own cost subject to cl. 9, the hirer remaining liable for arrears of instalments (apportioned if necessary) up to the date of such return and damages for breach hereof (if any).

I do not think that I need refer to cl. 7. By cl. 8, it was provided as follows:

> In case of any breach of any term hereof the owners may (*a*) without prejudice to their claim for arrears of instalments or damages for breach of this agreement forthwith without notice terminate the hiring and repossess themselves of and remove the goods (for which purpose their servants or agents may enter any premises the hirer may enter), (*b*) alternatively, by written notice (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely determine and end this agreement and the hiring thereby constituted and thereupon the hirer shall no longer be in possession of the goods with the owners' consent . . .

Then cl. 9 provided as follows:

> If the hirer exercises his or her rights under cl. 6, or if the owners have to take possession under cl. 8 (*a*), the hirer shall become liable to the owners for any sum necessary to make the amount paid under cl. 1 equal to 33⅓ per cent. of the total amount set out in the schedule [which amounts to the sum of £52 3*s*. 6*d*.] in respect of compensation and depreciation.

That was the hire-purchase agreement.

Following upon that agreement, the furniture was duly delivered to Miss Ross, and from time to time it was taken by her with the owners' consent to various premises, and latterly it was held by her at Croydon. After she went to Croydon, owing to illness and unemployment, as appears from the correspondence, she became in arrear with her payments under the hire-purchase agreement, and the plaintiffs became entitled, subject to certain conditions to which I need not refer, to retake possession of the goods under cl. 8, but they did not do so, and granted her indulgence at the time with regard to payment of instalments.

In 1941, Miss Ross was ill and out of work and she went away to the country. On or about Jan. 10, 1941, an oral arrangement was made under which the plaintiffs took the furniture into storage free of charge and on the account of Miss Ross, who, for her part, agreed to pay, while the plaintiffs agreed to accept, by way of separate current rent and arrears, sums at the rate of £1 per month commencing in Feb., 1941. Upon that, the articles were stored for Miss Ross by the plaintiffs at their warehouse. Following upon that, Miss Ross made a payment of £1 on Feb. 7, 1941, but made no further payments at all, and thereupon the plaintiffs wrote to her on Mar. 14, 1941, as follows:

> We note on referring to your account that no further payment has been received since Feb. 7, and we shall be glad if you will see that a further remittance is forwarded by return of post in adjustment, and at the same thme advise us what arrangements you can make regarding adjustment of the arrears.

Then there is an undated letter from Miss Ross which reads as follows:

> I sent my furniture back to you to store in January last. My account number was R.947. I regret that I have not been able to pay any more on this and you will see by the above address that I am no longer in London. I was ill and had to go away. I paid for my furniture regularly when I had it and had paid altogether roughly about £24.

Pausing there, she refers to the furniture as her furniture. The letter continues as follows:

> As I am not able to pay more and you have all the stuff back, is it possible for me to have a small allowance back? I do not expect much but I am ill and out of work and a little money would help me. An early reply will oblige.

In reply to that letter, the plaintiffs write as follows on June 3, 1941, after acknowledging receipt of her letter :

> We shall be very pleased to do this, but before doing so, having regard to the legal position which would require us if we desired to exercise our right to recover possession, to apply to the court against you for leave to do so, we make it a rule to set out A clearly the terms upon which the goods are being collected, and to ask our customers to sign a formal confirmation of those terms before we actually collect them. If you wish to do so we shall be pleased to collect the following goods [which are specified], and to release you from arrears of hire accordingly to date, and to refund you the sum of £10 in respect of the amount you have paid—namely, £34 2*s.* 6*d.*

They asked for a reply, and they sent a form asking her to sign it. Miss B Ross sent back the signed form, and said :

> I have signed the enclosed form and would be pleased to receive from you the sum of £10.

The form which was signed by her reads as follows :

> I have received your letter of the 3rd inst., and I confirm that it is my desire to determine my hire-purchase agreement dated Sept. 3, 1938, with you, which I C hereby do, pursuant to my right to do so under the Hire-Purchase Act, 1938. It is clearly understood between us that upon my returning the goods as agreed to you, that I shall be under no further liability to you for arrears of hire, and that you will return to me £10, being part of the sum I have paid on account of instalments under the agreement. Yours faithfully, Sadie Ross.

The matter has not yet been completed, as the plaintiffs desire to D obtain a decision of the court, in substance as to whether they are at liberty to act upon that arrangement without risk to themselves, having regard to the provisions of the Courts (Emergency Powers) Act, 1939.

On the facts of the case, I have come to the conclusion that the first move in the matter of getting rid of the hire-purchase agreement and E its consequences came from Miss Ross. It is further clear on the evidence that Smart Brothers, Ltd., had not been pressing for the return of the goods, and had made no threat and no suggestion of exercising the power to retake possession which was contained in the hire-purchase agreement. They certainly made no demand for the return of the goods. The form F the transaction assumed was designed to carry out, on terms which the plaintiffs were willing to concede, her desire to get rid of the hire-purchase agreement. She was free, apart from the provisions of the Courts (Emergency Powers) Act, 1939, to make an effective bargain, and there is no doubt that she understood what she was about. It may very well G be that she knew that Smart Brothers, Ltd., might be in a position to exercise their right to retake possession on getting leave, but that does not appear to me to be material. I am clearly of opinion that the contract, made in the circumstances which I have stated, was a real bargain. The contract was not a cloak intended to conceal a transaction under H which the owners were exercising the right conferred by the agreement to take possession. Secondly, I am of opinion, taking into consideration the rights and obligations of the parties under this new agreement, and taking into consideration the surrounding circumstances, that the point at issue was not the exercise of any right or the assertion of any right to take possession, but was the determination of a contract which Miss Ross had made and which she desired no longer to have continued.

In other words, the substance of the transaction was a cancellation of the original bargain, and not the exercise in any form of the right to take possession by the owners.

The question is whether, in the light of the decision of FARWELL, J., in *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.* (1) and the decision of the Court of Appeal in *Bowmaker, Ltd.* v. *Tabor* (2), effect can be given to a bargain so made, or whether it is invalid, having regard to the considerations of public policy involved.

The prohibition in the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii), is a prohibition that :

> . . . a person shall not be entitled, except with the leave of the appropriate court, (*a*) to proceed to exercise any remedy which is available to him by way of . . . (*ii*) the taking of possession of any property . . .

It is quite clear from the decisions in the two cases which I have mentioned that it is not open to a defendant to waive or otherwise get rid of the provisions of the Act, in the sense that he cannot by agreement waive the necessity of applying to the court before exercising the remedy.

I do not propose to read the judgments in *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.* (1) or those in *Bowmaker, Ltd.* v. *Tabor* (2), but, upon a consideration of those judgments, my opinion is that all that has been decided is that, directly or indirectly, no consent and no contract on the part of a hirer can get rid of the necessity of going to the court before exercising the remedy in one way or another. It does not appear to me that it goes further than that. It appears to me that, where neither in form nor in substance is the new transaction directed to avoid the provisions of the Courts (Emergency Powers) Act, 1939, and where it is in substance a bargain made by the hirer in virtue of her right of ownership in the goods, and where it is directed to her interests, then in such a case no consideration of public policy requires that full effect shall not be given to the bargain so made. Accordingly, I am of opinion that in this case the plaintiffs are entitled, having regard to the nature of the agreement which has been made with Miss Ross, to act upon it and to take possession, and are bound, of course, to pay the sum which they have agreed to pay.

Declaration that the plaintiffs are at liberty to take possession without obtaining any leave of the appropriate court.

Solicitors : *Tudor & Rowe* (for both parties).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

NOTE.

DEANE *v.* H. F. EDWARDS & CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., and Goddard and du Parcq, L.JJ.), **October 21, 22, 23, 1941.**]

By consent, this appeal by the plaintiff from a decision of WROTTESLEY, J., dated May 12, 1941, and reported [1941] 2 All E.R. 274, was allowed and judgment entered for the plaintiff for £750 and costs.

Gilbert J. Paull, K.C., and *F. Wishart* for the appellant.

G. Russell Vick, K.C., and *Montague L. Berryman* (for *Cyril Salmon* on war service) for the respondents.

The following remarks by LORD GREENE, M.R., and GODDARD, L.J., while not constituting a judgment in the appeal, are of considerable importance.

LORD GREENE, M.R.: In this case, the parties have fortunately been able to arrive at a solution without the court being called upon to pronounce upon the interesting questions which have been raised. I think it right to say that counsel for the respondents took a perfectly proper course, and, indeed, a highly commendable course, in doing what he did and withdrawing the defence once it became apparent that, whatever the intention in the minds of the officials of the insurance company may have been, the action which they took was one which would have the result of placing the injured person in a position into which in fairness he ought not to have been put. In view of the fact that, when this became apparent, counsel for the respondents took what I have described as a perfectly proper and commendable course, I do not wish to say anything further about the attitude of this insurance company or their actions in this case. However, leaving apart, as I say, any intention of theirs, and merely looking at the procedure which has been adopted, a procedure which to the knowledge of this court is adopted by many insurance companies, I think it is helpful to make a few general observations.

Insurance companies know as well as anybody else the difference between a claim under the Workmen's Compensation Act and a claim at common law. They know that a claim under the latter head, if it can be established, is likely to be much more beneficial to the workman, and, therefore, much more detrimental to themselves as underwriters. Accordingly, looking at the thing as a pure matter of cold business, it is to the advantage of insurance companies to secure, if they can, that the workman is tied to the Workmen's Compensation Act claim, and that he abandons the common law claim.

The relevant section of the Workmen's Compensation Act, 1925, is sect. 29, and it has caused a great deal of difficulty in construction. As the law stands at present, however, if the workman, whether or not he knows of his rights under the option which the section confers, can be made to agree to accept payments under the Workmen's Compensation Act as such, he is debarred thereafter from asserting a right at common law. Insurance companies are perfectly well aware of the significance of that state of the law. It gives them, or appears to give them, an opportunity of getting the workman to accept money as Workmen's Compensation Act payments in a manner which, although involving no fraud or deception, involves what, for want of a better word, I will describe as an extremely shabby action on their part. To take a form which, on the face of it, makes it clear that the payment is to be an agreed Workmen's Compensation Act payment, to put that before a workman who is suffering from the shock of injury, who is very likely in hospital, and who has no advisers near him, and to get him to sign it, and then afterwards, if, after having taken advice, he brings an action at common law, to say, "By accepting this money on the terms that it was a Workmen's Compensation Act payment, you have precluded yourself for ever from prosecuting what would be a much more valuable claim," appears to me to be an action of the shabbiest description. The legality of it does not come into the question. It may be observed in passing that, when the insurance company, who put themselves, under the terms of the policy, into a position where they are acting as the agents of the employer, deal direct with the injured workman, they are dealing with him in that capacity. It is perfectly true that in the present case they got the employer to put the form forward, and, in taking the present case as an illustration, it must not be thought that I am going back from what I have said at the beginning. I am not dealing with any question of motive in the present case. I am merely taking this as an example of the sort of document which insurance companies put forward to injured workmen. I think that it is deplorable that such a thing should be done, and done by English insurance companies whose reputation is always supposed to stand so high, not merely for the exact performance of their legal obligations, but also for decent, humane and reasonable behaviour. I therefore express the hope that, in so far as any insurance companies may read what I have been saying, they will take counsel and will see that in future this sort of advantage is never taken of an injured man of the class which is affected in nine hundred and ninety-nine cases out of a thousand—namely, the working class. In the present case, we are dealing with people of higher education, but in the majority of cases the persons affected cannot possibly be expected to understand the intricacies of the law. In a case where the insurance company are paying money which they would have to pay in any event, I cannot understand why they cannot take a simple receipt for the money without attempting to bind the workman to the receipt of a Workmen's Compensation Act payment. In that case, the workman would get the money which he really wants to keep his home together, and it would not prejudice him. The practice which has grown up is all the more deplorable in that it is directed against workmen whose wages are stopped and whose home has to be kept together. The temptation to get some money at once is naturally too great, and one to which a man in such circumstances ought not to be subjected. It is not for me to draft for insurance companies the proper form of document, but I think that what I have said is sufficient to make perfectly clear my view of the practice and my view as to what the practice ought to be.

To go back to the present case, as I have said, once it was pointed out that the procedure adopted was one which produced the impression on the court that, whatever the intention of the insurance company, it did facilitate and lead to taking an unfair advantage of the workman, the defence was very properly withdrawn.

GODDARD, L.J.: I entirely agree with everything which has fallen from LORD GREENE, M.R. The Workmen's Compensation Act, 1925, s. 29, contains provisions which have appeared in every Workmen's Compensation Act since 1897. In somewhat different words those provisions appeared in the Acts of 1897 and 1906 and in the Act of 1925, and they have caused, in my view, untold injustice. I have never understood why, because a small weekly payment is made and accepted by a workman, that should debar him for ever from pursuing a remedy at common law under which he may be entitled to a very large and substantial sum of damages in a case where he has been injured, and, as very often happens where he is engaged in an industrial occupation, may be injured for life. In the first volume of the Law Reports for 1940 there are no fewer than four reported cases of this sort. It may be, perhaps, that after the war the attention of the legislature will be directed to this matter, and they may consider whether some statutory mitigation of this rigorous legislation cannot be introduced so that the result to which I have referred will be avoided.

DU PARCQ, L.J.: I agree.

Solicitors: *P. S. Solomon, Archer & Co.* (for the appellant); *Blount, Petre & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

lied. BARKWAY *v.* SOUTH WALES
NSPORT CO., LTD. [1948] 2 All
. 460.

Dictum of LORD GREENE, M.R., at p. 337, *not followed.* YOUNG *v.* RANK. [1950] 2 All E.R. 166.

LAURIE *v.* RAGLAN BUILDING CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.), **October 24, 1941.**]

Negligence—Highways—Skid—Vehicle projecting over pavement—Presumption of negligence.

Practice—Submission of no case to answer—No evidence called for defendants—Right to new trial—What amounts to election to call no evidence.

In daylight, on a broad and good road, the defendants' lorry, heavily laden with wood, was being driven at a pace of 10 m.p.h. to 12 m.p.h. The road was in a dangerous condition at the time, as there had been a fall of snow which had frozen. The lorry skidded, and struck and killed the plaintiff's husband, who was on the pavement. At the hearing counsel for the defendants submitted that there was no case to answer, on the ground that it had not been proved that the accident was due to the negligence of the defendants' driver. The judge accepted the submission, and, although no evidence was called for the defendants, the judge did not ask counsel for the defendants whether he was going to call any evidence. Counsel for the plaintiff said that he assumed that no evidence was going to be called for the defence on the question of liability, but no answer was made to this :—

HELD : (i) the fact that the accident was due to the skidding of the lorry was neutral, and the onus was upon the defendants to show that their driver was not negligent, in the circumstances.

(ii) there could be no new trial on the question of liability. The position here was the same as if the judge had asked whether any evidence was being called for the defence and had received an answer in the negative.

[**EDITORIAL NOTE**. A vehicle on the highway may skid without any negligence on the part of the driver, and it was sought to deduce from this that proof that the accident resulted from a skid was not *prima facie* evidence of negligence. In the present case, however, the evidence went a good deal further than that, for it showed that the vehicle was travelling at 10 m.p.h. on a road with a slippery surface and was not provided with chains. The court has held that this amounts to a *prima facie* case of negligence. The remainder of the case is concerned with a slight extension of the law as laid down in *Alexander* v. *Rayson* (4). In the present case, counsel for the defendants was never asked by the judge to elect whether or not he would call any evidence, but, as counsel for the plaintiff had interpolated a remark that he assumed that that was the intention and that remark had elicited no answer, the position is treated as being the same as that where the judge has actually asked the question and the defendants' counsel has elected to call no evidence.

AS TO PRESUMPTION OF NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958 ; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 589-607.

AS TO SUBMISSION OF NO CASE, see YEARLY PRACTICE OF THE SUPREME COURT, p. 620.]

Cases referred to :

(1) *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652 ; 36 Digest 89, *594* ; 78 L.J.K.B. 1063 ; 101 L.T. 411.

(2) *Parry* v. *Aluminium Corpn., Ltd.* (1940), 162 L.T. 236 ; Digest Supp.

(3) *Halliwell* v. *Venables* (1930), 99 L.J.K.B. 353 ; Digest Supp. ; 143 L.T. 215.

(4) *Alexander* v. *Rayson*, [1936] 1 K.B. 169 ; Digest Supp. ; 105 L.J.K.B. 148 ; 154 L.T. 205.

(5) *Hunter* v. *Wright*, [1938] 2 All E.R. 621 ; Digest Supp.

APPEAL by the plaintiff from a judgment of WROTTESLEY, J., dated June 22, 1941. The plaintiff's husband was killed in an accident which occurred in Wadham Road, Walthamstow, on the afternoon of Jan. 16, 1940, and she sought to recover damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff's husband was standing on the pavement when a lorry driven by the defendants' driver skidded and knocked down four or five persons who were standing in a queue without seriously injuring any of them and then struck the end of the queue and caused the death of the plaintiff's husband. The road was in a dangerous condition at the time. It had been snowing earlier in the afternoon, and the snow had frozen. It was obvious that the accident was due to the skidding of the lorry. Without hearing evidence for the defendants, Wrottesley, J., accepted a submission that there was no case to answer, holding that a sufficient *prima facie* case had not been made out.

Gilbert Beyfus, K.C., and *Humfrey Edmunds* for the appellant.

Tristram Beresford, K.C., and *F. G. Paterson* for the respondents.

Beyfus, K.C.: It is for the defendants to rebut the inference of negligence which normally arises in the circumstances. It is not enough for them to point to the fact that, on the evidence, the lorry skidded on a slippery road. There is no reason for suggesting that there was a particularly slippery patch. The evidence is that the whole of the road was frozen. Some extra precaution should have been taken to see that the lorry did not skid when it became necessary to slow down. The driver of a lorry capable of inflicting serious injuries should take proper precautions. The mere fact that the lorry skidded on the icy road does not displace the obligation which rests upon the defendants of rebutting the *prima facie* presumption of negligence. In *Halliwell* v. *Venables* (3), Scrutton, L.J., condemned the practice of making submissions that there was no evidence to go to the jury so that the expense of another trial might be avoided. Unless counsel for the defendants elects to stand by his submission, there should be a new trial. In the past, the court has given a defendant an opportunity of calling evidence where no election was made. This course was followed in *Alexander* v. *Rayson* (4). If, however, the defendant has made an election, the Court of Appeal should decide the case on the evidence already given.

Beresford, K.C.: In the particulars of negligence, it is not stated that the lorry ever mounted the pavement or that the rule *res ipsa loquitur* applies. It was not alleged that the lorry mounted the pavement, and that fact was never proved. The tail part of the lorry came over the pavement. In *Wing* v. *London General Omnibus Co.* (1), it was said that merely colliding with a lamp post did not by itself show negligence. In the present case, there was no evidence that the skidding of the lorry was due to negligence in view of the condition of the road at the time. In *Wing* v. *London General Omnibus Co.* (1), the submission succeeded, and the question of negligence was not left to the jury. The question of nuisance, however, was left to the jury, and Fletcher Moulton, L.J., said, at p. 663, that there was no evidence that the driver of the omnibus was negligent. In the present case, the plaintiff proved all that could have been proved by calling the defendants' driver. There was evidence that all vehicles which passed the place of the accident about that time skidded more or less. The decisions in cases where vehicles have skidded are all considered in *Hunter* v. *Wright* (5). As regards a new trial, the present case differs from previous cases. *Alexander* v. *Rayson* (4) lays it down, in effect, that, unless a man is tied to his answer, he is entitled to a new trial.

Lord Greene, M.R.: In this case, at the conclusion of the evidence

called for the plaintiff the judge ruled in favour of the submission of counsel for the defendants that there was no case for him to meet. The facts are simple. In daylight, on a broad and good road, the defendants' ten-wheel lorry, heavily laden with wood, was being driven at a pace
A which, so far as the evidence goes, was 10 m.p.h. to 12 m.p.h. On its near side, numerous persons were standing on the pavement in a bus queue, and the deceased husband of the plaintiff was observed by one of the persons in the queue to cross the road with the obvious intention of lining up at the end of the queue. Just after this witness noticed
B the deceased man, he saw the lorry, which he said was a fair distance away. The lorry came into contact with persons in that queue. It knocked down some five people towards the head of the queue, and it knocked down and killed the husband of the plaintiff. There is a dispute as to whether or not the evidence shows that, at the time when the
C husband of the plaintiff was struck, he was on the pavement. In my opinion, the evidence on that point is reasonably convincing. If one takes the way in which the man was walking at the time when he was seen by the witness and the facts that the lorry at that moment was a fair distance away and that the police officer, who came up after the
D accident, found the deceased lying on the pavement, all those matters together seem to me, not merely to justify, but to lead cogently to, the conclusion that when the deceased was struck he was on the pavement.

What is the position where a person lawfully on the pavement is struck
E by a vehicle, which, in the ordinary course of things, has no right to be in that position ? It is contended on behalf of the appellant that the evidence shows that the lorry actually mounted the pavement, and there is an admission to that effect in the defence. On the other hand, it is said that the evidence which was led at the trial established that the
F wheels of the lorry never mounted the pavement at all, and on that proposition there is based the argument that, whereas, where a vehicle mounts the pavement with its wheels, a *prima facie* case of negligence is raised, no such *prima facie* case is raised in a case where all that happens is that some portion of the vehicle hangs over the pavement and hits a
G person lawfully upon that pavement. I will assume, without deciding it, that the wheels of the lorry did not, in this case, actually mount the pavement. I think that there is material upon which it could be found that they did, because the admission in the defence is evidence against the party on whose behalf that pleading is put in. Assuming, however,
H in favour of the respondents that it is not shown that the lorry mounted the pavement, it is shown beyond possibility of doubt that the tail part of the lorry did overhang the pavement to such an extent as to strike down persons lawfully upon the pavement. I cannot see why any distinction is to be drawn, for the purpose of the rule relating to a *prima facie* case of neligence, between a case where the wheels of a vehicle actually mount the pavement and one where a portion of the vehicle

sweeps across the pavement. In each case, the vehicle is in a position where it has no right to be. No vehicle has a right so to manoeuvre itself that its tail or its radiator, or whatever it may be, projects over the pavement to the injury of pedestrians lawfully there. Reliance for this suggested distinction was placed on *Wing* v. *London General Omnibus Co.* (1), but I am quite unable to find in that decision, which turned on some very special circumstances, any justification for such distinction. In my opinion, precisely the same principle applies in a case where a portion of the vehicle puts itself into a position over the pavement where it has no right to be.

That being the position, the plaintiff gave evidence which showed in the first instance that the position of the lorry over the pavement was due to a skid, and it is contended on behalf of the respondents that, assuming that a *prima facie* case of negligence arose, the circumstance establishing that the accident was due to a skid is sufficient to displace that *prima facie* case. In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence. If, in a case where a *prima facie* case of negligence arises, such as that with which I have been dealing, it is shown that the accident is due to a skid, and that the skid happened without fault on the part of the driver, then the *prima facie* case is clearly displaced, but merely establishing the skid does not appear to me to be sufficient for that purpose. As a matter of fact, the present case does not rest there, because, in my judgment, the evidence led by the plaintiff, so far from merely establishing a skid, which may or may not have been negligent, shows that the skid in this case was due to negligence on the part of the driver. The situation was that the roads were in an extremely dangerous condition. It had snowed at 2.30 p.m. that day and had frozen since, and the surface was like glass. Nevertheless, the roads being in that condition, as they frequently were during the winter in question, this very heavy ten-wheel lorry is driven at a speed of 10 m.p.h. to 12 m.p.h. without having any chains on its wheels, and it is said that that was driving with due care. I am quite unable to accept the proposition that, when the roads are in that well-known condition, a lorry of this kind, loaded in the way in which it was loaded, is entitled to proceed at such a speed. If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot pace. The evidence here, to my mind, quite clearly shows that the road was in such a condition that a prudent driver, even if he did not find it necessary to stop, would have proceeded at a very much slower speed when driving a vehicle of this kind. Therefore, I think that not only was there a *prima facie* case to be answered, merely stopping on the point that there was a skid, but the actual evidence was sufficient to call for an answer, even if it had been a case where there was no *prima facie* case of negligence at all.

The course which the trial took was this. After the evidence for the plaintiff had been concluded, on the question of liability counsel for the defendants submitted that there was no case. It is unfortunate, I think, that the judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court—namely, the practice of refusing to rule on the submission unless counsel for the defendants says that he is going to call no evidence. That must be regarded as the proper practice to follow, and it is to be found very lucidly set out, if I may say so, in the judgment of GODDARD, L.J., in *Parry* v. *Aluminium Corpn., Ltd.* (2). However, I do not wish it to be thought that there is any particular magic about that question being asked, because it seems to me that counsel can make it perfectly clear, by the words which he uses and by the way in which he acts, that he does not intend to call any evidence, and, that being so, he must be taken to have given a negative answer to the question which the judge might otherwise have put to him. At the trial in the present case, the counsel who appeared at the trial for the plaintiff said that he assumed that counsel for the defendants was not going to call any evidence. Counsel for the defendants was silent with regard to that challenge and proceeded with his argument. Before us, he admitted that, if the judge had put to him the question which he ought to have put, he would have said that he did not intend to call any evidence. That being so, it is clear to my mind that there can be no question of a new trial in the present case, and the matter must be dealt with on the evidence as it stands. On the evidence as it stands, it follows from what I have said that, in my opinion, the plaintiff has established liability. The only matter which remains is that of damages, and, with regard to that, the case did not proceed, so that we are not in a position to deal with it. The result is, therefore, that the appeal will be allowed on the question of liability, and there must be a new trial on the question of damages if the parties are unable to agree them.

GODDARD, L.J. : I agree and I do not wish to add anything.

DU PARCQ, L.J. : I also agree.

Appeal allowed on the question of liability. New trial on question of damages only.

Solicitors : *Vizard, Oldham, Crowder & Cash* (for the appellant) ; *R. I. Lewis & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

LIVERSIDGE *v.* ANDERSON AND ANOTHER.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Macmillan, Lord Wright and Lord Romer), **September 18, 19, 22, November 3, 1941.**]

Emergency Legislation—Imprisonment under defence regulation—Person of hostile associations—Onus of proof—Claim for damages for false imprisonment—Defence (General) Regulations, reg. 18B.

The appellant, who had been detained in prison under the Defence (General) Regulations, reg. 18B, which provided for the detention of persons of hostile associations, claimed a declaration that his detention was unlawful and damages for false imprisonment. The respondents in their defence admitted that the first respondent ordered the detention under the regulation. The appellant thereupon asked for particulars of the grounds on which the first respondent had reasonable cause to believe the appellant to be a person of hostile associations, and of the grounds on which the first respondent had reasonable cause to believe that, by reason of such associations, it was necessary to exercise control over the appellant. These were the matters which arise under reg. 18B :—

HELD (LORD ATKIN *dissenting*) : such particulars could be ordered only if the onus was upon the respondents to prove the various facts which justified the making of the order for detention. The onus of proving these matters was not on the respondents, and no order for particulars ought to be made. Where regulations are made for the safety of the realm and the administrative plenary discretion is vested in a Secretary of State, it is for him to decide whether he has reasonable grounds, and to act accordingly.

[**EDITORIAL NOTE.** In these notes it has been stated that it was well-settled that it is sufficient for the minister concerned to state his honest belief that there are reasonable grounds for the detention. The opinion herein of LORD ATKIN, although it is the only dissentient opinion, shows, perhaps, that that statement should have been more cautiously worded, for that great lawyer clearly takes the view that, if that belief is founded on facts capable of proof—in this case, that the appellant was a person of hostile associations—those facts should be proved to the court. This view he has based, not on decisions in previous cases, but upon the construction of the regulation. The majority of the House, however, have not so construed the regulation. It is agreed that the words, " if the minister has reasonable cause to believe " postulate two conditions, (*a*) if there is in fact reasonable cause for believing, and (*b*) if the minister believes it, but there are other factors governing the proper construction of these words. In cases under the regulation the facts are peculiarly within the knowledge of the minister, public policy and the national safety require that they shall not be made public and the matter is one for the exercise of the minister's exclusive discretion. These factors have been taken into account by the majority of the House in construing the regulation and the result has been to confirm the previous decisions of the courts in cases of this nature.

FOR THE LAW ON THE SUBJECT, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662 ; and FOR CASES, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to :

(1) *Doswell* v. *Impey* (1823), 1 B. & C. 163 ; 38 Digest 83, *608* ; 1 L.J.O.S.K.B. 99.

(2) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72 ; Digest Supp. ; 110 L.J.K.B. 42 ; 164 L.T. 41.

(3) *R.* v. *Halliday, Ex p. Zadig*, [1917] A.C. 260 ; 2 Digest 198, *560* ; 86 L.J.K.B. 1119 ; 116 L.T. 417.

(4) *R.* v. *Reynolds*, [1893] 2 Q.B. 75 ; 26 Digest 394, *1205* ; 69 L.T. 321 ; *sub nom. R.* v. *Frodsham JJ. and Edwards*, 62 L.J.M.C. 120.

(5) *R.* v. *Home Secretary, Ex p. Greene*, [1941] 3 All E.R. 104 ; Digest Supp.

(6) *Allen* v. *Wright* (1838), 8 C. & P. 522 ; 14 Digest 177, *1546*.

(7) *Mure* v. *Kaye* (1811), 4 Taunt. 34 ; 14 Digest 177, *1554*,

(8) *Stammers* v. *Yearsley* (1833), 10 Bing. 35 ; 43 Digest 441, *695* ; 2 L.J.C.P. 256.
(9) *Haynes* v. *Mervis* (1826), 5 L.J.O.S.K.B. 47 ; 43 Digest 455, *826*.
(10) *McCloughan* v. *Clayton and Riding* (1816), Holt, N.P. 478 ; 43 Digest 449, *773*.
(11) *Broughton* v. *Jackson* (1852), 18 Q.B. 378 ; 43 Digest 449, *774* ; 21 L.J.Q.B. 265 ; 19 L.T.O.S. 88.
(12) *Sayer* v. *Lichfold* (1854), 23 L.T.O.S. 324 ; 43 Digest 449, *775*.
(13) *Beckwith* v. *Philby* (1827), 6 B. & C. 635 ; 43 Digest 449, *776* ; 5 L.J.O.S.M.C. 132.
(14) *Walters* v. *Smith (W. H.) & Son, Ltd.*, [1914] 1 K.B. 595 ; 43 Digest 450, *783* ; 83 L.J.K.B. 335 ; 110 L.T. 345.
(15) *Barnard* v. *Gorman*, [1941] 3 All E.R. 45 ; Digest Supp.
(16) *Bowditch* v. *Balchin* (1850), 5 Exch. 378 ; 14 Digest 183, *1619* ; 19 L.J.Ex. 337 ; 15 L.T.O.S. 232.
(17) *Holroyd* v. *Doncaster* (1826), 3 Bing. 492 ; 43 Digest 455, *823* ; 4 L.J.O.S.C.P. 178.
(18) *The Zamora*, [1916] 2 A.C. 77 ; 37 Digest 652, *1071* ; 85 L.J.P. 89 ; 114 L.T. 626.
(19) *Hadley* v. *Perks* (1866), L.R. 1 Q.B. 444 ; 42 Digest 665, *754*.
(20) *Stuart* v. *Anderson and Morrison*, [1941] 2 All E.R. 665 ; Digest Supp.
(21) *Local Government Board* v. *Arlidge*, [1915] A.C. 120 ; 38 Digest 97, *708* ; 84 L.J.K.B. 72 ; 111 L.T. 905.
(22) *Herniman* v. *Smith*, [1938] A.C. 305 ; [1938] 1 All E.R. 1 ; Digest Supp. ; 107 L.J.K.B. 225.
(23) *R.* v. *Banks*, [1916] 2 K.B. 621 ; 15 Digest 848, *9323* ; 85 L.J.K.B. 1657 ; 115 L.T. 457 ; 12 Cr. App. Rep. 74.
(24) *R.* v. *Forde*, [1923] 2 K.B. 400 ; 15 Digest 853, *9367* ; 92 L.J.K.B. 501 ; 128 L.T. 798 ; 17 Cr. App. Rep. 99.
(25) *Alman* v. *Oppert*, [1901] 2 K.B. 576 ; Digest, Pleading, 198, *1663* ; 70 L.J.K.B. 745 ; 84 L.T. 828.
(26) *Thorne* v. *Motor Trade Assocn.*, [1937] A.C. 797 ; [1937] 3 All E.R. 157 ; Digest Supp. ; 106 L.J.K.B. 495 ; 157 L.T. 399 ; 26 Cr. App. Rep. 51.
(27) *Assam Railways & Trading Co., Ltd.* v. *Inland Revenue Comrs.*, [1935] A.C. 445 ; Digest Supp. ; 103 L.J.K.B. 583 ; 152 L.T. 26 ; 18 Tax Cas. 509.
(28) *Cox* v. *Hakes* (1890), 15 App. Cas. 506 ; 42 Digest 633, *367* ; *sub nom. Bell-Cox* v. *Hakes*, 60 L.J.Q.B. 89 ; 63 L.T. 392.
(29) *Eshugbayi Eleko* v. *Nigeria Government (Administering Officer)*, [1931] A.C. 662 ; Digest Supp. ; 100 L.J.P.C. 152 ; 145 L.T. 297.

Appeal by the plaintiff from an order of the Court of Appeal, dated June 20, 1941, and reported [1941] 2 All E.R. 612, where the facts are fully set out, dismissing an appeal by the plaintiff from an order of Tucker, J., dated May 23, 1941.

D. N. Pritt, K.C., and *G. O. Slade* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondents.

Viscount Maugham [read by Lord Macmillan] : My Lords, by this appeal the appellant, so far as form is concerned, is seeking merely to have certain particulars from the defendants, the present Secretary of State for Home Affairs and his predecessor in that office, of their defence in an action of false imprisonment. The master, the judge in chambers (Tucker, J.) and the Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.) have all held that the appellant is not entitled to any of the particulars he claims. In such a case, this House would not, generally speaking, entertain an appeal, but the circumstances are exceptional. The real object of the application is to raise at this early stage the vital question as to what onus, if any, lies on the respondents, as defendants in the action, in the circumstances of the case. The appellant is a person who was detained by an order made by Sir John Anderson as Home Secretary on May 26, 1940, under the Defence (General) Regulations, 1939, reg. 18B. The detention has been continued by the present Home Secretary. The validity of that detention has been raised in the action in which the appellant claims damages for false imprisonment and consequential relief. Such an action used to be described as an action for trespass *vi et armis*. The general rule of law in these cases is well stated by ABBOTT, C.J., delivering the judgment of the court in *Doswell* v. *Impey* (1). If, he says, persons having a limited authority [p. 169]:

> . . . do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass: but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action.

The respondents rely on the order for the detention of the appellant above referred to. If it is valid, the action must clearly fail. The appellant accordingly seeks to throw on the respondents the burden of justifying the order. It will be convenient shortly to state the pleadings, in order to show how, as a matter of pleading, the question of particulars arises.

The appellant (the plaintiff below) claimed by his writ, dated Mar. 6, 1941, a declaration that his detention in Brixton Prison was and is unlawful, and damages for false imprisonment. Para. (2) of the statement of claim alleges that the first defendant was, and the second defendant now is, His Majesty's Home Secretary. Paras. (3), (4) and (6) of the statement of claim are as follows:

> (3) By a document dated May 26, 1940, and expressed to be a detention order under the Defence (General) Regulations, 1939, reg. 18B, the first-named defendant ordered and directed that the plaintiff be detained. (4) In consequence and by reason of the said order and direction the plaintiff was on or about May 29, 1940, arrested, and he has since been and still is detained and imprisoned at His Majesty's Prison at Brixton. (6) In the premises the defendants have and each of them has caused and procured the unlawful detention and imprisonment of the plaintiff and the second-named defendant continues and intends to continue the same.

Para. (3) of the defence is as follows:

> The defendants admit that the first-named defendant ordered that the plaintiff should be detained under the Defence (General) Regulations, 1939, reg. 18B.

Para. (5) of the defence is as follows:

> None of the allegations contained in para. 6 of the statement of claim is admitted. Save as above expressly admitted, none of the allegations contained in the statement of claim is admitted.

It is desirable to state, so far as relevant, the Act of Parliament and the regulations under which the order for detention (or the document purporting to be such an order) was made. By the Emergency Powers (Defence) Act, 1939, s. 1 (1), it was provided that His Majesty by Order in Council:

> . . . may make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

By subsect. (2) it was enacted that :

> . . . without prejudice to the generality of the powers conferred by the preceding subsection, defence regulations may, so far as appears to His Majesty in council to be necessary or expedient for any of the purposes mentioned in that subsection [make provision for a number of important purposes, including regulations] for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm.

The regulations authorised by the Act are clearly of the widest possible character, and may affect, not only the liberty, but also the property, of all subjects, with a certain limit as regards authorising conscription and as to extending the powers of courts martial (subsect. (3)). The Emergency Powers (Defence) Act, 1940, gives even greater powers to the Crown. It was under the provisions of the Act of 1939 that the Defence (General) Regulations, 1939, were made, and they have been from time to time amended.

The Defence (General) Regulations, 1939, reg. 18B, referred to in para. (3) of the statement of claim and in para. (3) of the defence is in the following terms :

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

That is the material paragraph in the present case.

The regulation continues as follows :

> (1A) If the Secretary of State has reasonable cause to believe any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of, any such organisation as is hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained.
>
> The organisations hereinbefore referred to are any organisation as respects which the Secretary of State is satisfied that either—(*a*) the organisation is subject to foreign influence or control, or (*b*) the persons in control of the organisation have or have had associations with persons concerned in the government of, or sympathies with the system of government of, any power with which His Majesty is at war, and in either case that there is danger of the utilisation of the organisation for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty may be engaged, or the maintenance of supplies or services essential to the life of the community.
>
> (2) At any time after an order has been made against any person under this regulation, the Secretary of State may direct that the operation of the order be suspended subject to such conditions—(*a*) prohibiting or restricting the possession or use by that person of any specified articles ; (*b*) imposing upon him such restrictions as may be specified in the direction in respect of his employment or business, in respect of the place of his residence, and in respect of his association or communication with other persons ; (*c*) requiring him to notify his movements in such manner, at such times, and to such authority or person as may be so specified ; (*d*) prohibiting him from travelling except in accordance with permission given to him by such authority or person as may be so specified, as the Secretary of State thinks fit ; and the Secretary of State may revoke any such direction if he is satisfied that the person against whom the order was made has failed to observe any condition so imposed, or that the operation of the order can no longer remain suspended without detriment to the public safety or the defence of the realm.

> (3) For the purposes of this regulation, there shall be one or more advisory committees consisting of persons appointed by the Secretary of State; and any person aggrieved by the making of an order against him, by a refusal of the Secretary of State to suspend the operation of such an order, by any condition attached to a direction given by the Secretary of State or by the revocation of any such direction, under the powers conferred by this regulation may make his objections to such a committee.
>
> (4) It shall be the duty of the Secretary of State to secure that any person against whom an order is made under this regulation shall be afforded the earliest practicable opportunity of making to the Secretary of State representations in writing with respect thereto and that he shall be informed of his right, whether or not such representations are made, to make his objections to such an advisory committee as aforesaid.
>
> (5) Any meeting of an advisory committee held to consider such objections as aforesaid shall be presided over by a chairman nominated by the Secretary of State and it shall be the duty of the chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case.
>
> (6) The Secretary of State shall make a report to Parliament at least once in every month as to the action taken under this regulation (including the number of persons detained under orders made thereunder) and as to the number of cases, if any, in which he has declined to follow the advice of any such advisory committee as aforesaid.
>
> (7) If any person fails to comply with a condition attached to a direction given by the Secretary of State under para. (2) of this regulation that person shall, whether or not the direction is revoked in consequence of the failure, be guilty of an offence against this regulation.
>
> (8) Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorised by the Secretary of State and in accordance with instructions issued by him.

On Apr. 29, 1941, the appellant applied to the master in chambers for, *inter alia*, the following particulars—namely, particulars in writing of the allegation in para. (3) of their defence that the first-named defendant ordered that the plaintiff should be detained under the Defence (General) Regulations, 1939, reg. 18B: (*a*) of the grounds upon which the first-named defendant had reasonable cause to believe the plaintiff to be a person of hostile associations, and (*b*) of the grounds upon which the first-named defendant had reasonable cause to believe that, by reason of such hostile associations, it was necessary to exercise control over the plaintiff.

On May 8, 1941, Master Moseley heard the application and refused to make any order thereon. The appellant appealed from that refusal, and on May 23, 1941, Tucker, J., sitting as a judge in chambers, dismissed the appeal but gave the appellant leave to appeal to the Court of Appeal. The appellant appealed to the Court of Appeal, and the appeal was heard before MacKinnon, Luxmoore and du Parcq, L.JJ., on June 11, 12, 1941. The judgment of the court was delivered by MacKinnon, L.J. It was held by the court that, on the detention order being proved or admitted, the onus was on the plaintiff to prove that the order was invalid. It should be mentioned that the good faith of the Secretary of State is not challenged. The judgment proceeded as follows ([1941] 2 All E.R., at p. 615):

> To put the matter in another way, if the plaintiff admits, or if it is proved, that the plaintiff was detained by an order purporting or expressed to be issued under the regulation and duly signed as such, the burden is on the plaintiff, if he is to claim damages for false imprisonment, to give evidence showing that the order was invalid. As the case proceeds at the hearing, as often happens, the onus of

> proof may be shifted. If the plaintiff adduces evidence which goes to show the invalidity of the order, that might happen. If, upon that happening, the defendants produce evidence which is embarrassing to the plaintiff, by way of surprise or novelty, the judge would no doubt protect him by way of adjournment. Conceivably, in a proper case, the judge might at that stage make some order by way of particulars of the allegations of the defendants. These, however, are but hypothetical considerations as to possible developments at a later stage of the litigation. At this stage, we are quite clear that the plaintiff is wrong in his proposition as to the burden of proof inherently resting upon himself and upon the defendants respectively.

On this view, it naturally followed that the appellant at the present stage was not entitled to any of the particulars he was claiming, and the appeal was dismissed. Having regard to the great importance of the questions arising out of orders for detention under the Defence (General) Regulations, 1939, reg. 18B, the appellant was given leave to appeal to your Lordships' House on July 21, 1941.

The Court of Appeal in Oct., 1940, had had to consider the true meaning of reg. 18B (1) in an analogous case, *R.* v. *Home Secretary, Ex p. Lees* (2). That was an application for a writ of *habeas corpus* by Lees, who had been detained by an order of the Home Secretary, Sir John Anderson, under reg. 18B. Sir John Anderson in that case had made an affidavit stating that he had received and considered reports and information from persons in responsible positions who were experienced in investigating matters of the kind under consideration and to report to him confidentially that he had studied the reports, and that he had come to the conclusion that there were clear grounds for believing, and that he did in fact believe, that Lees was a member of such an organisation (stating the effect of the affidavit shortly) as is defined in reg. 18B (1A). The Court of Appeal then decided that the court could not act as a court of appeal from the decision of the Secretary of State, and that his affidavit proved to the satisfaction of the court that he had reasonable cause to believe, and did honestly believe, the matters in question, and, that being so, the order was validly issued. As I understand the judgment in *Lees*' case (2), it negatived the idea that the court had any power to inquire into the grounds for the belief of the Secretary of State (his good faith not being impugned), or to consider whether there were grounds on which he could reasonably arrive at his belief. The Court of Appeal in the present case was, therefore, precluded by the previous decision from considering the main point argued before your Lordships—namely, the question whether there were in fact reasonable grounds for the beliefs (i) that the appellant was a person of hostile associations, and (ii) that, by reason thereof, it was necessary to exercise control over him. In this case, however, the Secretary of State who made the order and his successor in office have not made any affidavit in the action, and the appellant, therefore, is entitled to contend, and does contend, that the mere production of an order signed by the Secretary of State is not a sufficient *prima facie* defence to the action of false imprisonment, and that an onus lies on the respondents to give evidence at the trial to prove that Sir John Anderson had reasonable grounds for the belief recited in the order. That order (following the language of the regulation) is in the following terms :

Defence (General) Regulations, 1939.
Detention Order.

Whereas I have reasonable cause to believe Jack Perlzweig @ Robert Liversidge to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him : Now, therefore, I, in pursuance of the power conferred on me by the Defence (General) Regulations, 1939, reg. 18B, hereby make the following order. I direct that the above-mentioned Jack Perlzweig @ Robert Liversidge be detained.

John Anderson,
One of His Majesty's Principal
Secretaries of State.

This point as to the evidence is perhaps not directly relevant on the question of particulars, but it was raised and dealt with in the Court of Appeal, and both sides have desired your Lordships to express your opinion on it. I propose first to deal with the important question of the construction of the words in the regulation, " If the Secretary of State has reasonable cause to believe etc."—that is, the question whether, as the appellant contends, the words require that there must be an external fact as to reasonable cause for the belief, and one, therefore, capable of being challenged in a court of law, or whether, as the respondents contend, the words in the context in which they are found point simply to the belief of the Secretary of State founded on his view of there being reasonable cause for the belief which he entertains. Secondly, I shall express my opinion on the question (which, strictly speaking, would not arise till the trial) whether the order of the Secretary of State is, in the circumstances, sufficient *prima facie* proof that the Secretary of State has acted lawfully and that the detention of the appellant was, and is, accordingly, not illegal.

Before dealing with the construction of the regulation, it is desirable to consider how the matter should be approached. The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to Magna Carta and the Bill of Rights, and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown. Adopting the language of LORD FINLAY, L.C., in this House in *R.* v. *Halliday. Ex p. Zadig* (3), at p. 271, I hold that the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the state is involved. The language of the Act of 1939 shows beyond a doubt that defence regulations may be made which must deprive the subject " whose detention appears to the Secretary of State to be expedient in the interests of the public safety " of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend (as the terms of the Act indeed suggest) on the unchallengeable opinion of the Secretary of State. The legislature obviously proceeds on the footing that there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorise the Secretary of State to make an order for detention. The only safeguards, if they be safeguards, are that detention "appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm," and that he himself is subject to the control of Parliament. It should be added that, as in *Halliday's* case (3), the power with which we are here concerned is to take preventive measures in the nature of internment which will last only for a limited time (see sect. 11 of the Act). There is no charge against the appellant.

My Lords, I think we should approach the construction of reg. 18B of the general regulations without any general presumption as to its meaning except the universal presumption, applicable to orders in council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the order in council rather than one which will defeat that intention. My Lords, I am not disposed to deny that, in the absence of a context, the *prima facie* meaning of such a phrase as "if A.B. has reasonable cause to believe" a certain circumstance or thing should be construed as "if there is in fact reasonable cause for believing" that thing, and if A.B. believes it. However, I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that, if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words may well mean, "if A.B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes" the thing in question. In the present case, there are a number of circumstances which tend to support the latter conclusion.

First, reg. 18B (1) and reg. 18B (1A) alike require the Secretary of State to have reasonable cause to believe two different things. Taking the first paragraph, he must in the first place believe the person (*a*) to be of hostile origin or associations, or (*b*) to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, or (*c*) to have been recently concerned in the preparation or instigation of such acts, or (*d*) to have been or to be a member of, or to be active in the furtherance of, the objects of organisations which are carefully defined by reference to the personal decision of the Home Secretary. Any one of these various circumstances is sufficient to satisfy the first fact which the Secretary of State must believe, and I do not doubt that a court could investigate the question whether there were grounds for a reasonable man to believe some at least of those facts if they could be put before the court. However, then he must at the same time also believe something very different in its nature—namely, that by reason of the first fact, "it is necessary to exercise control over" the person in question. To my mind, this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the order in council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law. If, then, in the present case, the second requisite as to the grounds on which the Secretary of State can make his order for detention is left to his sole discretion, without appeal to a court, it necessarily follows that the same is true as to all the facts which he must have reasonable cause to believe.

Secondly, it is admitted that the Home Secretary can act on hearsay, and is not required to obtain any legal evidence in such a case, and clearly is not required to summon the person whom he proposes to detain and to hear his objections to the proposed order. Since the Home Secretary is not acting judicially in such a case, it would be strange if his decision could be questioned in a court of law.

Thirdly—and this is of even greater importance—it is obvious that in many cases he will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this matter and in like matters for the defence of the realm. A very little consideration will show that the power of the court (under sect. 6 of the Act) to give directions for the hearing of proceedings *in camera* would not prevent confidential matters from leaking out, since such matters would become known to the person detained and to a number of other persons. It seems to me impossible for the court to come to a conclusion adverse to the opinion of the Secretary of State in such a matter. It is beyond dispute that he can decline to disclose the information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed. It is not *ad rem* on the question of construction to say, in reply to this argument, that there are cases in which the Secretary of State can answer the attack on the validity of the order for detention without raising the point of privilege. It is sufficient to say that there must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature. That must have been plain to those responsible in advising His Majesty in regard to the order in council, and it constitutes, in my opinion, a very cogent reason for thinking that the words under discussion cannot be read as meaning that the existence of "reasonable cause" is a matter which may be discussed in a court which has not the power of eliciting the facts which, in the opinion of the Secretary of State, amount to "reasonable cause."

Fourthly, it is to be noted that the person who is primarily entrusted with these most important duties is one of the principal Secretaries of State, and a member of the Government answerable to Parliament for a proper discharge of his duties. I do not think that he is at all in the same position as, for example, a police constable. It is not wholly immaterial to note that the Secretary of State is provided with one or more advisory committees (para. (3)), and that he has to report to Parliament at least once in every month as to the action taken by him and the orders he has made, and as to the number of cases in which he has declined to follow the advice of the advisory committee (para. (6)). These provisions seem to point to the fact that the Secretary of State may be answerable to Parliament in carrying out duties of a very important and confidential nature. I have heard no explanation of the circumstance that no express provisions are made in the regulation as to an appeal from the Secretary of State's decision, unless it is the fact that no such appeal was intended. It seems to me that, if any such appeal had been thought proper, it would have been to a special tribunal with power to inquire privately into all the reasons for the Home Secretary's action, but without any obligation to communicate them to the person detained. The objections to an appeal in a case of mere suspicion and in time of war are not far to seek, but, however that may be, an application to the High Court, with power to the judge to review the action of the Secretary of State, seems to be completely inadmissible, and I am unable to see that the words of the regulation in any way justify the conclusion that such a procedure was contemplated.

The main argument for the appellant, apart from the contention as to the principle of construction applicable to a case where the liberty of the subject is concerned, with which I have already dealt, is based upon the difference of language used as regards the belief of the Secretary of State in different sections of the regulations, and, indeed, in different parts of reg. 18B. Thus, it is pointed out that in several places, and in particular in reg. 18B (1A), the Secretary of State is only required to be " satisfied " of something (see, for example, regs. 2D, 18A (1)). In these cases, it is conceded that there is no recourse to the court, provided, of course, that the Secretary of State acts in good faith. The different phrase " has reasonable cause to believe " points, it is said, to a different standard and a different meaning (see, for example, regs. 1A, 2C (2), 18B). It is added that the present reg. 18A is not the original regulation, but a new regulation (see S.R. and O., 1939, No. 1681, bearing date Nov. 23), replacing the words in the original clause, which ran thus :

> The Secretary of State if satisfied with respect to a particular person that with a view to preventing him acting in any manner prejudicial to the public safety or the defence of the realm it is necessary to do so may [*inter alia*] make an order directing that he be detained.

It is apparent that this is an earlier and imperfect attempt at the present regulation, which entirely supersedes it.

These considerations are not without weight, though three observations fall to be made. The first is that orders in council making regulations pursuant to an Act of Parliament do not in general receive the same attention and scrutiny as statutes, and it is important to remember that, though they may be annulled, they cannot be amended in either House (see sect. 8 of the Act), so that errors in language, if detected, cannot be corrected. There are, of course, no three readings and no committee stage in either House. In my opinion, it would be a mistake to attribute the same force to an alteration of language in an amending order in council as in an amending statute. The second observation is that even in statutes, changes of words often occur without a change of meaning. The third observation is that the words " has reasonable cause to believe " are not without a probable meaning. It may well have been thought desirable to draw the attention of the Secretary of State to the fact that, in certain cases, and in particular in cases in which he was considering the serious step of depriving a person of his liberty for an uncertain period, he must himself have considered whether there was reasonable cause for forming the belief which would justify his action. On the other hand, I suppose he might be " satisfied " of some fact by the report of one of his subordinates in whom he placed complete confidence. Apart, however, from these considerations, I am of opinion that the arguments above enumerated in favour of the construction for which the Attorney-General contends must greatly outweigh any arguments which your Lordships have heard on the other side, and that his construction must prevail. The result is that there is no preliminary question of fact which can be submitted to the courts, and that, in effect, there is no appeal from the decision of the Secretary of State in these matters, provided only that he acts in good faith. It follows, and it is not disputed by the appellant's counsel, that, on this view, the application for particulars must fail.

I can now deal much more shortly with the question whether an onus is thrown on the first respondent, the Secretary of State who made the order for detention, to give evidence to show that he had reasonable cause to believe the appellant to be a person of hostile associations, and that, by reason thereof, it was necessary to exercise control over him. The order on its face purports to be made under the regulation, and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion, the well-known presumption *omnia acta rite esse praesumuntur* applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken *prima facie*—that is, until the contrary is proved—to have been properly made, and it must be taken that the requisite as to the belief of the Secretary of State was complied with. It will be noted that, on the view I have expressed as to the construction of the regulation, it is the personal belief of the Secretary of State which is in question, and that, if the appellant's contention on this point were correct, the same question would arise in the numerous cases where an executive order depends on the Secretary of State or some other public officer being " satisfied " of some fact or circumstance. It has never, I think, been suggested in such cases that the Secretary of State or public officer must prove that he was so " satisfied " when he made the order. Just as the fact that the act of the Secretary of State acting in a public office is *prima facie* evidence that he has been duly appointed to his office, so his compliance with the provision of the statute or the order in council under which he purports to act must be presumed unless the contrary is proved. There are scores of instances of such presumptions to be found in the books, none, I think, precisely in point, but many in which the principle was less necessary on A the score of public convenience than the present. If an instance is required, it may be found in the rule that, where local authorities have made a rate under an Act, compliance with the formalities required by that Act will be presumed until the contrary is shown (*R.* v. *Reynolds* (4)).

I shall not take up your Lordships' time by dealing with the various B recent cases relating to these detention orders which were quite properly cited to your Lordships, for the reason that they have all been considered and examined at length by SCOTT and GODDARD, L.JJ., in the recent case of *R.* v. *Home Secretary, Ex p. Greene* (5), and I could not usefully add anything to what they have said. In my opinion, the present appeal C should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKIN: My Lords, I have prepared an opinion which is applicable both to this case and to *R.* v. *Home Secretary, Ex p. Greene.* These cases raise the issue as to the nature and limits of the authority D of the Secretary of State to make orders that persons be detained under the Defence (General) Regulations, 1939, reg. 18B. The matter is one of great importance, both because the power to make orders is necessary for the defence of the realm and because the liberty of the subject is seriously infringed, for the order does not purport to be made for the E commission of an offence against the criminal law. It is made by an executive Minister, and not by any kind of judicial officer. It is not made after any inquiry as to facts to which the subject is party. It cannot be reversed on any appeal, and there is no limit to the period for which the detention may last. The material words of the regulation F are as follows:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him he may make an order against that person directing that he be detained.

They are simple words, and, as it appears to me, obviously give only a G conditional authority to the Minister to detain any person without trial, the condition being that he has reasonable cause for the belief which leads to the detention order. The meaning, however, which for the first time was adopted by the Court of Appeal in *Greene's* case (5) and appears to have found favour with some of your Lordships is that there is no con- H dition, for the words "If the Secretary of State has reasonable cause" merely mean, "If the Secretary of State thinks that he has reasonable cause." The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that—and who could dispute it, or, disputing it, prove the opposite?—the Minister has been given complete discretion as to whether or not he should detain a subject. It is an absolute power, which, so far as I know, has never been given before to the executive, and I shall not apologise for taking some time to demonstrate that no such power is in fact given to the Minister by the words in question. It is a curious fact that in both cases in the first emergence of the issues raised no trace of this contention appeared. In the Liversidge case, the only question raised is in an action for false imprisonment brought by the plaintiff. Following on a defence setting up detention under an order of the Secretary of State, the plaintiff asked for particulars of the reasonable cause. The only question raised on the summons before the judge in chambers was on the onus of proof, and, as both courts held that the onus was upon the plaintiff to show that there was no reasonable cause, the order for particulars was refused. It is apparent that, if at that time the courts had accepted the present construction, no question of onus would have arisen, for no issue as to the actual existence of reasonable cause would arise. In Greene's case, the application was by summons for a writ of *habeas corpus*. The Divisional Court took the same view of the onus as was adopted in the Liversidge case, and held that, in view of the Secretary of State's affidavit in answer to the plaintiff's evidence, the court was not satisfied that there had been no reasonable cause. These matters became irrelevant on the construction adopted by the Court of Appeal on appeal in *Greene's* case (5). The view there taken by SCOTT, L.J., ([1941] 3 All E.R., at pp. 109, 110), was that the words " reasonable cause " cannot properly be construed

> . . . as imposing an objective condition precedent of fact on which a person detained would be entitled to challenge as grounds of the Secretary of State's honest belief : in short, that the condition is subjective not objective.

This view of the case at once disposed of any objection to the different grounds adopted by the Divisional Court, and is of such overwhelming importance compared with the issues raised in both cases up to that point that I proceed at once to deal with it, reserving till later what has to be said on the original onus.

It is surely incapable of dispute that the words " If A has X " constitute a condition the essence of which is the existence of X and the having of it by A. If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute, the tribunal, whatever it may be, which is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact. In others, it is one of both fact and law. In all cases, however, the words indicate an existing something the having of which can be ascertained, and the words do not mean, and cannot mean, " If A thinks that he has." " If A has a broken ankle " does not mean and cannot mean, " If A thinks that he has a broken ankle." " If A has a right of way " does not mean, and cannot mean, " If A thinks that he has a right of way." " Reasonable cause " for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause, is in our law to be determined by the judge, and not by the tribunal of fact, if the functions deciding law and fact are divided. Thus, having established, as I hope, that the plain and natural meaning of the words "having reasonable cause" imports the existence of a fact or state of facts, and not the mere belief by the person challenged that the fact or state of facts exists, I proceed to show that this meaning of the words has been accepted in innumerable legal decisions for many generations, and that "reasonable cause" for a belief, when the subject of legal dispute, has always been treated as an objective fact, to be proved by one or other party and to be determined by the appropriate tribunal. I will go further, and show that, until June or July, 1941, in connection with this reg. 18B, there has never been any other construction even submitted to the courts, in whatever context the words are found.

The power of arrest is confided by the common law both to constables and to private individuals. The constable has power within his district to arrest a person on reasonable suspicion of his having committed a felony. The private individual has power on two conditions—namely, (i) that a felony has actually been committed, and (ii) that there is reasonable and probable cause of suspecting the person arrested. In these cases, the grounds for suspicion must be brought before the court. The onus is on the person who arrested to prove the reasonable grounds, and the issue of whether or not the cause is reasonable is to be determined by the judge. These propositions will be found in any elementary textbook. I will refer to authority that the defendant in an action for false imprisonment based on unlawful arrest is entitled to succeed if he pleads and proves that the imprisonment was legally justifiable (*Allen* v. *Wright* (6) and *Mure* v. *Kaye* (7)), that he must show the cause of suspicion so that the court may judge of the reasonableness (*Stammers* v *Yearsley* (8) and *Haynes* v. *Mervis* (9)), that a man directing a constable to act on a suggestion of felony is bound to show probable cause of suspicion (*McCloughan* v. *Clayton and Riding* (10)), that the plea must show reasonable and probable ground of suspicion, i.e., facts which raise a reasonable suspicion, not all the evidence (*per* LORD CAMPBELL, C.J.), and it is for the court to say whether the facts pleaded show reasonable cause (*per* WIGHTMAN, J., in *Broughton* v. *Jackson* (11)), that it is a good plea that the man was arrested on a reasonable suspicion of felony, but not enough that the suspicion was *bona fide* (*Sayer* v. *Lichfold* (12)), that the civilian defendant must make out a reasonable ground of suspicion and that a felony has actually been committed (*per* LORD TENTERDEN, C.J., in *Beckwith* v. *Philby* (13), and a more recent affirmation of the same principles in *Walters* v. *Smith* (*W. H.*) *& Son, Ltd.* (14)). In all these cases, it is obvious that the courts were dealing with an objective fact to be proved before them by the defendant, and that their pronouncements would be nonsense if the inquiry had only been as to whether the defendant believed that he had reasonable ground. So much for the constable's power of arrest at common law. He and other persons have also been armed with powers of arrest by statute, and in all cases the condition of reasonable cause for suspicion has been enacted. I take the list of statutes from MORIARTY ON POLICE LAW, 4th Edn., p. 16 *et seq.* :

> Aliens Restriction Acts, 1914 and 1919, Aliens Order, 1920, art. 19 : Any person who acts in contravention of this order or is reasonably suspected of having so acted may be arrested without warrant by any constable.
>
> Diseases of Animals Act, 1934, s. 43 : A constable may stop and detain any person reasonably suspected of having engaged in committing an offence against the Act.
>
> Army Act, 1881, s. 154 : On reasonable suspicion a deserter or absentee without leave may be arrested without warrant.
>
> Children and Young Persons Act, 1933, s. 13 : A constable may arrest without warrant any person whom he has reason to believe has committed an offence if he believes such person will abscond. Note the two beliefs, one qualified, the other not.
>
> Criminal Law Amendment Act, 1912, s. 1 : A constable may arrest without warrant any person whom he shall have good cause to suspect of having committed any offence.
>
> Dangerous Drugs Act, 1920, s. 14 : Any constable may arrest without warrant any person who is reasonably suspected by the constable of having committed an offence if he has reasonable ground for believing that that person will abscond. Note by contrast the Firearms Act, 1920, s. 10 : If any person refuses to give his name and address or is suspected of giving a false name or address or of intending to abscond the constable may arrest him without warrant.
>
> Municipal Corporations Act, 1882, s. 193 : A borough constable may while on duty arrest any idle or disorderly person . . . whom he has just cause to suspect of intention to commit a felony.
>
> Official Secrets Act, 1911, s. 6 : Any person . . . who is reasonably suspected of having committed an offence may be arrested without warrant.
>
> Pawnbrokers Act, 1872, s. 34 : A pawnbroker may detain any person offering to pawn any article which he reasonably suspects to have been stolen.
>
> Penal Servitude Act, 1891, s. 2 (1) : Any constable may arrest without warrant any holder of a convict's licence whom he reasonably suspects of having committed any offence.
>
> Offences against the Person Act, 1861, s. 66, and the Malicious Damage Act, 1861, s. 57 : Any constable may arrest without warrant any person whom he shall find loitering in any highway whom he shall have good cause to suspect of having committed or being about to commit any felony mentioned in the Acts.
>
> Road Traffic Act, 1930, s. 28 : A constable may arrest without warrant any person reasonably suspected of taking a motor vehicle without the owner's consent.

Can any person doubt that, in respect of these powers given by statute to arrest for suspicion or belief of offences, or intentions to commit offences, other than felonies, the constable is in exactly the same position as in respect of his common law power to arrest on reasonable suspicion of felony, and that there is an "objective" issue in case of dispute to be determined by the court? No other meaning has ever been suggested. The words, moreover, do not relate merely to powers of arrest. In any context in which they are used, they give rise to a similar issue of law or fact cognisable by the court. By the Criminal Law Amendment Act, 1922, s. 2, it is provided as follows :

> Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under sect. 5 or 6 of the Criminal Law Amendment Act, 1885 . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section.

It is well-settled that the onus of proving reasonable cause for belief is on the accused, and that the section means that the accused had reasonable cause to believe and did believe. It is so much an "objective" fact that in this case reasonable belief is left to the jury. The subjective test would startle any judge versed in trying crimes. Similarly, by the Age of Marriage Act, 1929, s. 6, which avoids a marriage where either party is under sixteen, it is a defence in proceedings under the Criminal Law Amendment Act, 1885, for the accused to prove that he had reasonable cause to believe that the girl was his wife.

A very familiar use of the words is in actions for malicious prosecution, where the plaintiff has to establish the absence of reasonable or probable cause in the prosecutor for instituting the prosecution. The relevant facts known to the prosecutor are, if necessary, determined by the jury. The judge determines whether they constitute reasonable cause. The inquiry is "objective," and the cause of action, if established with the essential element of malice, exists against any person, rich or poor, powerful or weak, including any member of the executive, whether Secretary of State or not. A further use of the words is to be found in the Directors' Liability Act, 1890, s. 3, by which it is provided that a director of a company is liable for untrue statements unless he proves that he had reasonable cause to believe that they were true.

So far, I have sought to establish that the words in question are not ambiguous, that they have only one plain and natural meaning, that with that meaning the words have been used at common law and in numerous statutes, that, whenever they are used, the courts have given them the meaning I suggest and have considered that they give rise to a justiciable issue, and that, as to the "subjective" meaning now contended for by the Secretary of State, it has never at any time occurred to the minds of counsel or judges that the words are even capable of meaning anything so fantastic. I will now proceed to show that in the Defence (General) Regulations themselves the persons responsible for the framing of them—may I call them for this purpose the legislators? —have shown themselves to be fully aware of the true meaning of the words, have clearly appreciated the difference between having reasonable cause to believe and believing without any condition as to reasonable cause, and have obviously used the words "reasonable cause" in order to indicate that mere honest belief is not enough. The object is plainly that of the common law and previous statutes to secure some measure of protection for the public by providing a condition, which, if necessary, can be examined by the courts. In the first place, when the decision is left to the Minister or other executive authority without qualification, the words omit the reference to reasonable cause. "If it appears to the Secretary of State that a person is concerned" etc. (order as to publication, 2 C), "Secretary of State may if it appears to him necessary" (order as to giving information, 3G), "If it appears to the Secretary of State to be necessary" (order as to the protected places, 12 (1)), so in 14B, 18A, 16A, 21A, 40, 43. The wording is sometimes varied with the same result. "If the Secretary of State is satisfied" (publication in newspaper, 2D) (articles likely to assist enemy, 4C), "Satisfied that it is necessary or expedient" (prohibition of balloons, 7 (2)), (restricting movements of persons, 18A) (organisation subject to foreign influence, 18AA). Similar words are to be found in regs. 35 (1), 39B and 39C.

In all these cases, it is plain that unlimited discretion is given to the Secretary of State, assuming, as everyone does, that he acts in good faith. Now let us examine the regulations which import the words "reasonable cause," some in reference to the commission of an offence, some to a defence to a charge, and some to the powers given to executive officers to do acts for the protection of the state. There are as many as twenty-three, and I take them in numerical order, but it will be obvious to which class they belong :

> 1. (1) No person shall (*a*) do any act . . . (*d*) having reasonable cause to believe that the act . . . is likely to result . . . (*e*) do any act . . . having reasonable cause to believe that [it] is likely to mislead . . .
>
> 1A. No person shall (*a*) do any act having reasonable cause to believe that it will be likely to . . . interfere . . .
>
> 2C. (2) . . . Provided that it shall be a defence . . . to prove that [the alleged offender] had no intent to foment opposition . . . and had no reasonable cause to believe that the matter published was calculated to foment . . .
>
> 4. (1) No person shall associate . . . with any other person having reasonable cause to believe that that other person is engaged in assisting the enemy . . .

I only pause here to inquire why this belief as to association is objective, as it clearly is, while precisely similar words in reg. 18B, used of the Secretary of State, are subjective. I return to the regulations.

> 7. (3) If any person authorised in writing by a Secretary of State . . . to act under this paragraph has reasonable ground to believe that there is in any premises apparatus . . . he [may authorise a search].
>
> 9. (4) Whenever any person . . . finds dead . . . a racing pigeon or homing pigeon to which there is attached any article which he has reasonable cause to believe to be a means . . .
>
> 11. (3) . . . the appropriate officer . . . may . . . search any article which the traveller has with him . . . and, if the appropriate officer has reasonable ground for suspecting that the traveller has . . . about his person [any such article may] search him . . .

Could anything be clearer than the distinction between the unlimited power to search an article and the limited power to search the person ? This is made plainer by the express and unconditional power given by reg. 12 (3), which provides that :

> . . . any constable . . . may search any person entering . . . a protected place . . .

Then reg. 18 (3) provides as follows :

> The Secretary of State may make provision by order for securing that . . . any person entering . . . the United Kingdom, may (*a*) if there is reasonable cause to believe that he has come from any territory to which this paragraph applies, or (*b*) if he is unable to satisfy the Secretary of State or any person authorised . . . as to his identity . . . be detained . . .

Note that the detention may be by an authorised person. The distinction between the conditions in (*a*) and (*b*) is obvious. I omit for the moment reg. 18B itself, though, as I shall point out, there is a direct indication in the very words of this particular regulation that the well-established meaning is being applied.

> 18BB. (1) A Secretary of State may by order provide for empowering any Regional Commissioner who has reasonable cause to believe any person (*a*) to be [as specified in reg. 18B] . . . to direct the detention of that person pending consideration by the Secretary of State . . . (1A) A Secretary of State may by order

> provide for empowering any Regional Commissioner . . . (*b*) who has reasonable cause to believe that the recent conduct of any person [within a specified area] indicates . . . that person is likely to assist the enemy, to direct the detention of that person . . .
>
> 18D. (1) If any person upon being questioned by a constable or by a member of His Majesty's Forces . . . fails to satisfy [him] as to his identity or [purposes] the constable or member of His Majesty's Forces may, if he has reasonable ground to suspect that that person is about to act [prejudicially], arrest him without warrant . . .
>
> 25. (1) Where, as respects any premises, it appears to any officer of police of a rank not lower than that of inspector . . . that by reason of the fact . . . (*d*) that there is reasonable ground for believing that a source of danger exists on the premises by reason of the presence thereon of unexploded ammunition . . . the [inspector] may take . . . steps . . . (2) Any person authorised by a Secretary of State . . . may, if satisfied with respect to any chattel that . . . the chattel is contaminated by any lethal gas . . . [take steps, including destruction].

Note that the limitation as to reasonable cause in respect of premises is not imposed in the case of chattels.

I now come to a regulation which uses the words "reasonable cause," and is clearly subjective :

> 42C. (1) A chief officer of police . . . if so authorised . . . by the Secretary of State, may, if he is satisfied in the case of any premises in his district that there is reasonable cause to believe that [those premises are unlawfully used, close them].

Reg. 42C (2), (3), provides as follows :

> (2) Any person . . . aggrieved . . . may appeal to a court of summary jurisdiction, and the court shall, if it is satisfied by the appellant that there is no reasonable cause to believe [the before-mentioned condition], revoke the order . . . (3) Any constable authorised . . . by the chief officer of police . . . may . . . search any premises . . which the chief officer of police has reasonable grounds for suspecting to be premises [subject to the regulation].

The difference between (1) and (3) is obvious.

> 56A. *Control of building operations, etc.* (4) It shall be a defence for a person . . . to prove that . . . he had reasonable ground for believing that the cost . . . would not exceed £500.
>
> 79. (1) Whenever any person finds an article as to which he has reasonable cause to believe . . . that, immediately before being lost . . . it was used . . . for the purposes of an armed force . . . the person finding the article (*a*) shall . . . cause it to be delivered ,to a member of His Majesty's Forces.
>
> 88A. (1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting [an offence], he may grant a search warrant . . . (2) A person authorised . . . may search every person . . . whom he has reasonable grounds to believe to have recently left . . . those premises . . . (3) If an officer of police of a rank not lower than that of superintendent . . . has reasonable ground for suspecting [an offence], and . . . it is impracticable to apply for a warrant . . . the said officer . . . may . . . confer [a] power of search . . .
>
> 88B. (2) If . . . any constable . . . has reasonable ground for suspecting that there is to be found in [any] vehicle . . . evidence of the commission of [an offence], he may search the vehicle . . . and may seize any article . . . which he has reasonable ground for believing to be evidence . . .
>
> 88C. (1) Any constable . . . may arrest without warrant any person whom he has reasonable ground for suspecting to have committed any of the [scheduled offences, which include any offence against any of the regulations].
>
> 90. (2) Any person who knowing or having reasonable cause to believe . . . another person . . . guilty of an offence . . . gives that other person any assistance . . . shall be guilty of an offence . . .
>
> 94. (1) Any article coming into the possession of an executive authority . . . which the authority has reasonable ground for believing to be evidence of the commission of [certain offences] . . . may be retained . . .

I would also draw attention to the power to "use reasonable force" to enter premises conferred by reg. 89 (2), (3), and also by reg. 23C and reg. 23BA compared with the power to use such force as shall appear to the person to be reasonably necessary in regs. 45 (3), 45C, 45D (3) and 46 (5).

I have pointed out that the words in question have a plain and natural meaning, that that meaning has been invariably given to them in statements of the common law and in statutes, that there has been one invariable construction of them in the courts, and that the Defence (General) Regulations themselves clearly recognise that meaning, using different words where it is intended that the executive officer should have unqualified discretion. I have not so far called attention to the wording of reg. 18B itself, which, as I venture to think, establishes within a few lines the distinction on which the appellants rely:

> (1A) If the Secretary of State has reasonable cause to believe any person to have been or to be a member of . . . [a certain organisation], and that it is necessary to exercise control over him, he may make [a detention order].

The organisations in question are defined as follows:

> . . . any organisation as respects which the Secretary of State is satisfied that either (*a*) the organisation is subject to foreign influence or control, or (*b*) the persons in control of the organisation have or have had associations with persons concerned in the government of, or sympathies with the system of government of, any Power with which His Majesty is at war . . .

The organisations, therefore, are impugned if the Secretary of State is satisfied as to their nature, but the person is not to be detained unless the Secretary of State has reasonable cause to believe that he is a member. The contrast is all the more marked where the words of reg. 18B (1) "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations" are compared with the words of reg. 18B (1A) which I have just quoted, which in substance say as to (*b*) "If the Secretary of State is satisfied that the persons in control of the organisation have hostile associations." Why the two different expressions should be used if they have the same "subjective" meaning no one was able to explain. I suggest that the obvious intention was to give a safeguard to the individual against arbitrary imprisonment. Finally, if all these considerations failed, and if there were a certain ambiguity in the words "has reasonable cause to believe," the question would be conclusively settled by the fact that the original form of the regulation issued in Sept., 1939, gave the Secretary of State the complete discretion now contended for ("The Secretary of State if satisfied, etc."). However, it was withdrawn, and was published in Nov., 1939, in its present form. It is not competent to us to investigate what political reasons necessitated this change, but it is at least probable that it was made because objection had been taken to the arbitrary power, and it was seen that Parliament might intervene. What is certain is that the legislature intentionally introduced the well-known safeguard by the changed form of words.

If, then, the natural construction of the words indicates an objective condition to the power of the Minister to detain, the existence of which must, therefore, in case of dispute, be cognisable by a court of law, what room is there for any other construction? I will deal with the suggested inconvenience to the Minister or possible prejudice to the interests of the state later on. I venture to quote the words of VISCOUNT SIMON, L.C., in *Barnard* v. *Gorman* (15), a case turning on the meaning of the word "offender" in a section of the Customs Consolidation Act, 1876. VISCOUNT SIMON, L.C., said, at p. 48:

> Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because, on a narrower construction, the words might leave a loophole for frauds against the revenue. If, on the proper construction of the section that is the result, it is not for judges to attempt to cure it. That is the business of Parliament.

In that case, the words were "the offender may be either detained or proceeded against by summons," and the question was whether the word "offender" necessarily connoted that the person detained had in fact committed an offence, or whether it included a person who was reasonably suspected of having committed an offence. Inasmuch as the very words referred to proceeding by summons, which necessarily involved an investigation into the guilt or otherwise of the person in question, it was considered by all the members of this House quite clear that the word was capable of both meanings, and could not have been used in the same sentence in the narrower meaning for detention and the broader for summons.

The respondents sought to find support in the decision in *R.* v. *Halliday, Ex p. Zadig* (3), in which this House affirmed a decision of the Court of Appeal and of a Divisional Court of which I happened to be a member. In that case, the regulation undisputedly gave to a Secretary of State unrestricted power to detain a suspected person, though only on the recommendation of an advisory committee presided over by a judge. The argument for the appellant was that the regulation was *ultra vires*, because, though the words of the Defence of the Realm Act under which that regulation was made were plainly wide enough to enable a regulation to be made giving unrestricted powers, yet they ought to be read with a limitation in favour of liberty. Every judge who dealt with the case, including the noble Lords, refused to limit the natural meaning of the words, pointing out that a state of war would itself tend to confine the construction to the plain meaning of the words, and would discourage any attempt to make the words lean in favour of liberty. What that case has to do with the present I cannot see. No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any Minister with unlimited power over the person and property of the subjects. The only question is whether in this regulation they have done so.

In the present case, there is, in the first place, no ambiguity at all, and, in the second place, even if it were open to a judge to consider the question of expediency, what are the suggested grounds which compel him to adopt the hitherto unheard of "subjective" construction? It is said that it could never have been intended to substitute the decision of judges for the decision of the Minister, or, as has been said, to give an appeal from the Minister to the courts. No one, however, proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the constable. The judge has to bear in mind that the constable's authority is limited, and that he can arrest only on reasonable suspicion, and the judge has the duty to say whether the conditions of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief, any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict. For instance, the Minister may have reasonable cause on the information before him to believe that a person is of "hostile origin." If so, any remedy in the courts, either by an action for false imprisonment or by way of *habeas corpus*, is impossible, though it should subsequently be proved beyond doubt that the Minister's information was wrong and that the person was of purely British origin. The only remedy for such a mistake is to bring objections before the advisory committee, whose advice is not binding, and to make representations to the Minister himself.

It is said, however, that the grounds of belief will or may be confidential matters of public importance and that it is impossible to suppose that the Secretary of State was intended to disclose either his grounds or his information to the court. My Lords, the objection is answered by the very terms of the regulation itself. By paras. (4) and (5), the detained person has the right to make objections to an advisory committee, and it is the duty of the chairman;

> . . . to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case.

These grounds and particulars must, of course, be furnished to the chairman by the Secretary of State, for otherwise the chairman has no means of knowledge. What are these grounds and these particulars but the very facts constituting the "reasonable cause" which, on the true construction, might have to be investigated by the court? I find myself unable to comprehend how it can be compulsory, as it is, to furnish the objector before the committee with the grounds and particulars, and yet impossible in the public interest to furnish the objector with them in court. The supposed difficulty is grossly exaggerated, even if it is not a fantasy. *Greene's* case (5) illustrates this. On May 22, 1940, he was detained under an order which recited that the Home Secretary had reasonable cause to believe him to be a person of hostile association, and that, by reason thereof, it was necessary to exercise control over him. On July 15, 1940, he was served with a document in the following terms:

> Home Office, Advisory Committee, 6 Burlington Gardens, W.1.
> Reasons for order under Defence Regulation 18B in the case of Benjamin Greene.
>
> The order under Defence Regulation 18B was made against you for the following reason. The Secretary of State has reasonable cause to believe that you have been recently concerned in acts prejudicial to the public safety and the defence of the realm and in the preparation and instigation of such acts and that it is necessary to exercise control over you.

Then follow six paragraphs of particulars referring to his being concerned in the management and control of two named organisations and to the

nature of speeches and writings of his, and to the facts that he was privy to the activities of a named person in the publication of pro-German propaganda in a named periodical, that he was, subsequent to the outbreak of the war, communicating with persons in Germany concerned in
A the government of Germany, that he was desirous of establishing a National Socialist regime in Great Britain with the assistance, if received, of German armed forces, that he freely associated with persons of German nationality who he had reason to believe were agents of the German Government, and that there was reasonable cause to believe that he
B desired and intended to continue the actions aforesaid. It is true that the "reason" given was not that stated in the order, but it is explained that this was a mistake, and the "particulars" are vouched in an affidavit of the Home Secretary as particulars of the original reason of "hostile association." It is obvious that no important reasons of state prevented
C the Home Secretary from disclosing the causes of his belief, but it is said that the sources of his information may be confidential. I think that this in some cases is likely to be so, but I cannot think that this creates any difficulty. The Home Secretary has the right to withhold evidence which he can assure the court is confidential and cannot, in the public
D interest, be disclosed. He has in this case and in others sworn affidavits to the effect that the information he acted on was the result of reports and information from persons in responsible positions experienced in investigating matters of this kind and that he accepted their information. Before the era of "subjective" cause—and, indeed, afterwards—the
E Divisional Court and the Court of Appeal have accepted these affidavits as satisfactory proof of the existence of reasonable cause. This was not a view favoured by the Attorney-General in the present case, for it weakens his case as to public mischief. In fact, however, if the affidavits are supported by statements by or on behalf of the Secretary of State
F vouching the necessity of withholding the names of the witnesses in the public interest, I personally agree with the former decisions, and cannot see why, if the courts believe the Home Secretary and accept the substance of the information as constituting reasonable cause, they should not be satisfied that reasonable cause has been shown. The source of the
G information is merely a question going to the credibility of the person informed, and no doubt to the issue of reasonableness. In police matters, however, it is often withheld, and, if, for instance, a constable defending an action for false imprisonment or wrongful arrest were to give in evidence that an informant whom he believed and had proved to be
H trustworthy had told him that the plaintiff was present at the scene of the felony in incriminating circumstances, and the constable was corroborated by his inspector and sergeant, but declined to give the name of the informant, I think it clear that the court might accept the evidence as proving reasonable cause for suspicion. I agree with the Divisional Court in Greene's case, accepting what appears at that time to be the contention of the Home Secretary, that the Home Secretary's affidavit

establishes the particulars as constituting reasonable cause. I think that the members of the Court of Appeal, though infected with the "subjective" virus, took the same view. In addition to this, it must be remembered that by the Emergency Powers (Defence) Act, 1939, s. 6, there is complete power in the court to order proceedings to be heard *in camera*, and to prohibit the disclosure of any information concerning them. I cannot believe that proceedings for false imprisonment or for a writ of *habeas corpus* present more difficulties of this kind than does the trial of a spy. Lastly, on this question of expediency, I would recall that for months after the regulation came into force this suggested difficulty never presented itself to the minds of the Home Secretary and his advisers. On the contrary, in *R.* v. *Home Secretary*, *Ex p. Lees* (2), the Home Secretary, when represented by the present Solicitor-General and the same junior counsel as in this case, frankly accepted the burden of proving reasonable cause.

It was further said that the provision of safeguards in the regulation itself, the resort to the advisory committee, the providing of "reasons and particulars," and the right to make representations to the Secretary of State indicate that the original power to detain was unconditional. How unconvincing this appears. These safeguards are nothing compared with those given to a man arrested by a constable, who must at once be brought before a judicial tribunal, which investigates the case in public. Yet the constable, or anyone else empowered to arrest on reasonable cause, is liable to an action if he has exceeded his authority.

What appears to me to be the only argument as to expediency which has any weight was put forward by the respondent and was that derived from the second point of the powers, given "reasonable cause to believe," "that by reason thereof it is necessary to exercise control over him." Adroitly, the Attorney-General dealt with this first. Can it be supposed, he said, that it was intended that the accumulated experience, instinct, and knowledge of the Minister in coming to a decision on this matter could be replaced by a judgment of a court of law? However, first things first. Before this decision is made, there has to be a valid belief that the subject was of hostile origin, association, etc. Once this was established, it is very unlikely that a court would not in most cases accept as reasonable the Home Secretary's decision to detain. However, even on this part of the machinery for detention there is ample scope for an independent inquiry. Let us take the case of "hostile origin." If a man or a woman of hostile origin made the case that he or she had been a loyal subject for 30 or 40 years, was a supporter of the British war effort, and had never taken any part in any hostile activity, would it not be open to the courts to consider whether, by reason of the hostile origin, it was necessary to control him or her? Could the Home Secretary support a mere order to detain all persons of hostile origin, regardless of age, sex or antecedents? Could he support an order against a subject who had been a member of an organisation which the Home Secretary was satisfied was now within reg. 18B (1A) (*a*) or (*b*), but had ceased to be for years, and had genuinely disclaimed any sympathy with its present objects? It must be remembered that, at the time of the issue of the regulation, organisations of both left and right were under suspicion, and there may well have been good reasons for granting protection to persons who had merely at some time or other been members of them without more.

I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time, leaning towards liberty, but following the *dictum* of POLLOCK, C.B., in *Bowditch* v. *Balchin* (16), cited with approval by LORD WRIGHT in *Barnard* v. *Gorman* (15), at p. 55. POLLOCK, C.B., said, at p. 381:

> In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.

In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put upon words, with the effect of giving an uncontrolled power of imprisonment to the Minister. To recapitulate, the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and, when it is intended to express the meaning now imputed to them, different and apt words are used in the Defence Regulations generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity, or no such degree of public mischief as would lead to a non-natural construction.

I know of only one authority which might justify the suggested method of construction. "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." (ALICE THROUGH THE LOOKING GLASS, c. vi.) After all this long discussion, the question is whether the words "If a man has" can mean "If a man thinks he has." I am of opinion that they cannot, and that the case should be decided accordingly.

If it be true (as, for the foregoing reasons, I am profoundly convinced that it is) that the Home Secretary has not been given an unconditional authority to detain, the true decision in the two cases before us ought not to be difficult to make. In the case of Liversidge, the plaintiff has delivered a statement of claim averring that he was wrongly imprisoned by the defendant, the Secretary of State. The defendant traverses the wrongful imprisonment, and contents himself with the admission that he ordered the plaintiff to be detained under the regulation. The plaintiff asked for particulars of the defendant's reasonable cause to believe (*a*) hostile associations, and (*b*) the necessity to control him. In my opinion, the defendant is not bound to rely on the traverse, though, as a matter of pleading, that, in my opinion, amounts to a positive allegation of authority to detain for which particulars may be asked. The plaintiff's right to particulars, however, is based upon a much broader ground, and on a principle which again is one of the pillars of liberty, in that in English law every imprisonment is *prima facie* unlawful, and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who, from the nature of his office, cannot be sued, and the validity of whose judicial decisions cannot, in such proceedings as the present, be questioned. My noble and learned friend LORD MACMILLAN suggests that, under a more exacting system of pleading, the plaintiff would have to aver the absence of reasonable grounds on the part of the Secretary of State. The English system of pleading was exacting enough a hundred years ago, but then and ever since, by reason of the presumption which I have stated, the averment in an action against a constable for false imprisonment was and has been in the form adopted in the present case, and the defendant had to plead his justification with particulars (*Holroyd* v. *Doncaster* (17) and the cases cited earlier in this opinion). There is no distinction of persons. The defendant has to justify with particulars, and, in my opinion, the plaintiff was clearly right in asking for particulars. If the defendant were able to satisfy the court that he could not give particulars, in the public interest, the court either would not order particulars, or, if the objection came after the order, would not enforce it. There was no evidence of this kind at the hearing of this summons, and, in my opinion, the appeal ought to be allowed and an order made in the terms of the summons.

In Greene's case, the circumstances are not the same. It may be that, in an application for a writ of *habeas corpus*, the applicant can rely on the presumption against imprisonment and seek to throw the onus without more on the defendant, but in practice he does not do so. He puts material before the court to lead to the conclusion that the imprisonment was unlawful, and that is what the applicant did here. The Secretary of State appears to have been ready to meet the allegation of absence of reasonable cause. He referred to his order and to the particulars given by the advisory committee, which he insists were correct, and he made the affidavit, already referred to, that he acted on the information of reliable informants. His affidavit does not claim privilege in the correct form, but he instructed the Attorney-General on his behalf to claim privilege, which in this case, in the absence of any objection to this course by the applicant, must be taken to be sufficient. The Divisional Court were of opinion that, in view of this evidence, the applicant failed A to satisfy them that there was an absence of reasonable cause. I have given my reasons for agreeing with them, and I would go further and say that, in view of the particulars, as to which I take it to be proved that the Secretary of State had information which he could reasonably believe, the Secretary of State has established reasonable cause for believing both B the hostile associations and the necessity for control.

Of course, if the subjective theory is right and the Secretary of State has indeed unconditional power of imprisonment, it is enough for him to say that he exercised the power. However, it seemed to be suggested in argument that, even if the power were conditional, yet it would be a C good return by the Secretary of State to say that he had made the order in the terms of the regulation. This seems to me, with respect, to be fantastic. A Minister given only a limited authority cannot make for himself a valid return by merely saying: "I acted as though I had authority." His *ipse dixit* avails nothing. A constable would make no D valid return by saying, "I had reasonable cause for my arrest," or "I served the criminal at the time with a written notice that I was arresting him for reasonable suspicion of felony." However, on my view of this, the Secretary of State has made a return sufficient to indicate that the Divisional Court were right in refusing to order the writ to issue. I E think that the appeal in Greene's case should be dismissed.

LORD MACMILLAN: My Lords, by common assent at your Lordships' bar it was agreed that the substantial question in these proceedings relates to the true meaning and effect of certain words contained in the F Defence (General) Regulations, 1939, reg. 18B (1). By that regulation the Secretary of State is empowered to make an order for the detention of any person if he has:

> . . . reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by G reason thereof it is necessary to exercise control over him . . .

Before he exercises the power confided to him of making a detention order against any individual, the Secretary of State must have reasonable cause to believe certain things about that individual. Does this mean that the Secretary of State must have such cause of belief regarding H the relevant facts as a court of law would hold sufficient to induce belief in the mind of any ordinary reasonable man, or does it mean that he must have such cause of belief as he himself deems to be reasonable? To require that a cause of belief shall be reasonable necessarily implies a reference to some standard of reasonableness. Is the standard of reasonableness which must be satisfied an impersonal standard independent of the Secretary of State's own mind, or is it the personal standard of what the Secretary of State himself deems reasonable? Between these two readings there is a fundamental difference in legal effect. In the former case, the reasonableness of the cause which the Secretary of State had for his belief may, if challenged, be examined by a court of law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and, to enable the court to adjudicate upon this question, there must be disclosed to it the facts and circumstances which the Secretary of State had before him in arriving at his belief. In the latter case, it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called upon to disclose to anyone the facts and circumstances which have induced his belief, or to satisfy anyone but himself that these facts and circumstances constituted a reasonable cause of belief.

Before discussing which of these rival views ought to prevail, I must first indicate briefly the form in which the question has come before your Lordships. On May 26, 1940, the respondent Sir John Anderson, then Secretary of State for Home Affairs, made and signed an order in the following terms:

> Defence (General) Regulations, 1939.
> Detention Order.
>
> Whereas I have reasonable cause to believe Jack Perlzweig @ Robert Liversidge to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him: Now, therefore, I, in pursuance of the power conferred on me by the Defence (General) Regulations, 1939, reg. 18B, hereby make the following order: I direct that the above-mentioned Jack Perlzweig @ Robert Liversidge be detained.
>
> John Anderson,
> One of His Majesty's Principal Secretaries of State.

In virtue of this order, the appellant was taken to Brixton Prison, where he has since been detained.

On Mar. 6, 1941, the appellant took out a summons against the respondent Sir John Anderson and also against Herbert Stanley Morrison, who now in succession holds the office of Secretary of State for Home Affairs. In his statement of claim, the appellant made, *inter alia*, the following allegations:

> (3) By a document dated May 26, 1940, and expressed to be a detention order under the Defence (General) Regulations, 1939, reg. 18B, the first-named defendant ordered and directed that the plaintiff be detained.
>
> (4) In consequence and by reason of the said order and direction the plaintiff was on or about May 29, 1940, arrested and he has since been and still is detained and imprisoned at His Majesty's Prison at Brixton.
>
> (6) In the premises the defendants have and each of them has caused and procured the unlawful detention and imprisonment of the plaintiff and the second-named defendant continues and intends to continue the same.

The statement concludes by claiming a declaration that the appellant's detention and imprisonment were and are unlawful, damages for false imprisonment, and, against Mr. Morrison, an injunction against the continued detention and imprisonment of the appellant. The respondents lodged a defence admitting that Sir John Anderson ordered that the appellant should be detained under the Defence (General) Regulations, 1939, reg. 18B, but otherwise making no admission.

The appellant subsequently applied to the master for an order on the respondents to give particulars:

> . . . (*a*) of the grounds upon which the first-named defendant had reasonable cause to believe the plaintiff to be a person of hostile associations; and (*b*) of the grounds upon which the first-named defendant had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over the plaintiff.

This application was refused by the master and on appeal successively by TUCKER, J., and the Court of Appeal.

I cannot refrain from remarking on the economy of the appellant's averments. The action is one of damages for false imprisonment, but the appellant nowhere states categorically that he has been wrongly imprisoned, or in what respect the order in consequence and by reason of which he says he has been detained is illegal, irregular or defective. In particular, he does not allege what appears to be his real complaint—namely, that the Secretary of State had no reasonable ground to believe that the appellant was a person of hostile associations, and that by reason thereof it was necessary to exercise control over him. Under the more exacting rules of pleading to which I was accustomed in the courts of Scotland, the relevancy and sufficiency of the averments which I have above set out would certainly not have escaped criticism. Be that as it may, it is at least abundantly clear that the action is of an exploratory nature. The appellant claims that he is entitled to explore the mind of the Secretary of State in order to find out what was the state of his information, in the hope that, when this is revealed, it may prove to be such that the court will hold it not to afford a reasonable cause for the belief which the Secretary of State professed to entertain, when judged by the standard of the ordinary reasonable man.

I am thus brought back to the point from which I started, for the answer to the question whether the appellant is entitled to explore the mind of the Secretary of State depends entirely on the true interpretation of the language in which his powers are conferred upon him. For the appellant, it was maintained that the words of the regulation were clear and unambiguous. The competency of the Secretary of State to make a detention order was, it was argued, plainly subject to a condition precedent. There must exist in fact reasonable cause for belief in certain things, quite independently of what the Secretary of State himself chose to believe. It was further said that "reasonable cause" was a term of art, frequent and familiar in similar contexts, and that it always carried with it a reference to an external or impersonal standard. I do not agree that the critical phrase in the context in which I find it is susceptible of only one meaning—namely, that for which the appellant contends. Were it so, it would be strange that several learned judges should have found it to possess quite a different meaning. Had the phrase run in impersonal form—"If there is reasonable cause to believe"—there would have been more justification for maintaining that there was no ambiguity, though I should not, even so, have regarded the matter as beyond question. However, the regulation does not so run. It reads, "If the Secretary of State has reasonable cause to believe," and thus at once introduces a personal, and not an impersonal requirement.

Holding, then, as I do, that the opening words of the regulation are open to interpretation, I now propose to seek what aid I can from the permissible sources of guidance. In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.

It is, therefore, proper to consider with what object the regulation was made. This appears clearly from the terms of the empowering statute, the Emergency Powers (Defence) Act, 1939. By sect. 1 (1) of that Act:

> . . . His Majesty may by Order in Council make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

Subsect. (2) in particular authorises the making of defence regulations, *inter alia* :

> . . . for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm . . .

There could be no clearer evidence of the intention of Parliament to authorise the abrogation in the public interest, and at the absolute discretion of the Secretary of State, of the ordinary law affecting the liberty of the subject. A perusal of the whole Act and of the subsequent Act of 1940 is sufficient to satisfy any reader of the extraordinary interferences with the citizen's most cherished rights of person and property which, in the view of Parliament, may be necessary and proper in the present grave national danger. In considering the interpretation of the regulation authorising the Secretary of State to make detention orders, I therefore bear in mind that Parliament has expressly contemplated that he should by regulation be empowered to do so at his absolute discretion. I also note as indicative of the abnormal and temporary character of the legislation that it is expressly limited in duration. With its expiry the power of detention will, of course, also come to an end.

In the next place, it is relevant to consider to whom the emergency power of detention is confided. The statute has authorised it to be conferred upon a Secretary of State, one of the high officers of state, who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office, and who has access to exclusive sources of information. In a question of interpreting the scope of a power, it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility.

I turn now to the nature of the topics as to which the Secretary of State is, under the regulation, to have reasonable cause of belief. They fall into two categories. The Secretary of State has to decide (i) whether the person proposed to be detained is a person of hostile origin or associations or has been recently concerned in certain activities, but he has also to make up his mind (ii) whether by reason thereof it is necessary to exercise control over that person. The first of these requirements relates to matters of fact, and it may be that a court of law, if it could have before it all the Secretary of State's information—an important "if"—might be able to say whether such information would to an ordinary reasonable man constitute a reasonable cause of belief. How could a court of law, however, deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, and not one of fact? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share. As Lord Parker said in *The Zamora* (18), at p. 107:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

I may also quote the words of Lord Finlay, L.C., in *R.* v. *Halliday, Ex p. Zadig* (3), at p. 269:

> It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law.

The question is one of preventive detention justified by reasonable probability, not of criminal conviction, which can only be justified by legal evidence.

As I have indicated, a court of law manifestly could not pronounce upon the reasonableness of the Secretary of State's cause of belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge, both of facts and of policy, which he had. However, the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him. What is to happen then ? The appellant says that the court is entitled, and has a duty, to examine the grounds of the Secretary of State's belief. The court, however, is also bound to accept a statement by the Secretary of State that he cannot, consistently with the public interest, divulge these grounds. Here is indeed an *impasse.* The appellant's solution has the merit of courage, not to say audacity. He says that, where the Secretary of State, by declining to disclose his information, has failed, through no fault of his own, to justify the detention, he must be held confessed of having falsely imprisoned the detained person, and must be mulcted in damages. It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure, yet the court is to be constrained, where detention is most justifiable, to find the detention unjustified. I decline to accept an interpretation of the regulation which leads to so fantastic a result.

Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred upon the Secretary of State. However, the argument is the other way when it is found that elaborate provision is made, as it is in this regulation, for the safeguarding of the detained person's interests. I refer to the constitution of advisory committees to which any person aggrieved by a detention order may make representations. The duty is imposed upon the chairman to inform the objector of the grounds upon which the detention order has been made and to furnish him with such particulars as are, in the chairman's opinion, sufficient to enable him to state his case. I say nothing as to the efficacy of this safeguard, for I do not know how it operates in practice, but I emphasise the significance of its presence in the regulation. It suggests that this special procedure was introduced for the very reason that review by the law courts was excluded. Yet here again the paramount concern not to diminish the personal authority and responsibility of the Secretary of State is evidenced by the recognition of his right to decline to follow any advice given to him by an advisory committee. Nevertheless, says the appellant, he must accept the decision of a court of law, however contrary to his own view. I note a further safeguard in the requirement that the Secretary of State must at least every month report to Parliament as to the action taken by him under the regulation (including the number of persons detained under orders made thereunder) and as to the number of cases, if any, in which he has declined to follow the advice of an advisory committee.

The regulation concludes with the following provision :

> (8) Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorised by the Secretary of State and in accordance with instructions issued by him.

I see the force of the point taken by the appellant that this gives protection to the Secretary of State only where a person has been detained "in pursuance of" the regulation, and does not protect him where the detention is not warranted by the regulation, but the provision A at least exhibits anxiety to afford the Secretary of State the fullest measure of protection when acting within his powers.

I must not omit to notice the appellant's argument founded on the contrast between the opening words of the regulation in conferring the power of detention on the Secretary of State and the words used B elsewhere in the regulations when other powers of an admittedly discretionary character are conferred upon him and upon others. The argument is that, where different words are used, a different meaning is intended. The argument by contrast is of little assistance in the present instance, for the regulations have observed no uniformity of C language. BLACKBURN, J., once said, in *Hadley* v. *Perks* (19) [at p. 457] that you ought never

> . . . to change the form of words unless you are going to change the meaning and it would be as well if those who are engaged in the preparation of Acts of Parliament would bear in mind that that is the real principle of construction. But in drawing Acts of Parliament the legislature, as it would seem, to improve the D graces of the style and to avoid using the same words over and over again constantly change them . . .

The regulations before your Lordships certainly exhibit a remarkable diversity of terminology. Thus, I find the following expressions used with relation to various powers confided to various persons, "If it appears E to the Secretary of State," "If the Secretary of State is satisfied," "If he considers it necessary," "Where it is shown to the satisfaction of," and "Where it appears to the proper authority that there is reason to believe." More intensive study of the regulations would probably disclose further variations in language where there is no substantial F difference in meaning and effect. The argument that, when the regulations mean different things they use different language, and when they mean the same thing they use the same language, breaks down, regrettable as this must be to the drafting purist.

Then it is said, however, that the critical words have been introduced G by an amendment of the language used in the regulation as originally made, and must be taken to have been altered advisedly. I do not know, and it would not be proper for me to inquire, why a change was made, but it may well be that, in view of the gravity of this matter of detention, it was thought right to adopt more emphatic words by way H of admonition to the Secretary of State to make sure of his grounds before he took action. If the regulation had been framed so as to read, as the appellant would read it, "If the Secretary of State has such cause of belief as a court of law would hold to be reasonable," I doubt if it would have commended itself as an emergency measure. Courts may differ as to what is reasonable. A judge of first instance might hold the Secretary of State to have been justified in his belief, the Court of Appeal might take another view and this House might have its own view. In a matter at once so vital and so urgent in the interests of national safety, I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law may disagree with him, and also without the further liability that, should the court do so, or if he cannot consistently with his duty disclose to the court the grounds of his belief, he will be mulcted in damages for false imprisonment as having acted outwith his powers.

My Lords, I make no apology for having discussed so fully the various aspects of the question before the House, for it is one of the highest importance. I yield to no one in my recognition of the value of the jealous scrutiny which our courts have always rightly exercised in considering any invasion of the liberty of the subject, but I remind myself that, in the words of Lord Atkinson in *R.* v. *Halliday, Ex p. Zadig* (3), at p. 271 :

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement.

The liberty which we so justly extol is itself the gift of the law, and, as Magna Carta recognises, may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause, it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention.

In the Court of Appeal, the question was approached from the point of view of onus, as was not unnatural in view of the form in which the matter came before the court. I have preferred to deal with the substance, but, in view of what was said in the Court of Appeal, I should add that, in my opinion, the production by the Secretary of State of an order of detention by him *ex facie* regular and duly authenticated, such as the House has before it in this case, constitutes a peremptory defence to any action of false imprisonment, and places upon the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid. Counsel for the appellant admitted that, if the House should adopt the interpretation of the regulation which I have reached, the appeal must be dismissed, and I concur in the motion that that be its fate.

Lord Wright: My Lords, this appeal and the appeal in Greene's case which immediately followed it have the common feature that each involves an inquiry into the true construction of reg. 18B, one of the defence regulations made under the Emergency Powers (Defence) Act, 1939. The argument on construction has primarily turned upon para. (1) of the regulation, which is in these terms :

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

The remainder of the regulation will require to be considered in so far as it throws light on the effect of the words just quoted. In the present appeal, the appellant has been, and is being, detained in pursuance, or purported pursuance, of the regulation under an order made by the first respondent in which he stated that he had reasonable cause to believe the appellant to be a person of hostile associations, and that, by reason thereof, it was necessary to exercise control over him. The appellant brought an action for unlawful imprisonment against the first respondent who originally made the order during his period of office as Home Secretary, and against his successor, the second respondent, who confirmed and continued it. In form, the proceedings under appeal simply involve an application for particulars by the appellant :

> . . . of the grounds upon which the first respondent had reasonable cause to believe the appellant to be a person of hostile associations and to believe that by reason thereof it was necessary to exercise control over him.

The application has been refused by the master, by Tucker, J., and by the Court of Appeal. The respondents have relied upon the order (which was admitted in the statement of claim) as showing on its face the lawful exercise of the powers and duties vested in, or imposed on, them under the regulation, and, without more, showing a sufficient justification. The appellant has contended that the detention order was not sufficient justification on its face, because the validity of such an order depends on proof by the respondents of what, according to the arguments of the appellant, was a " condition precedent to its validity " —namely, that the Home Secretary had reasonable cause to believe the two matters set out in the order and hence that the respondents could not rely on the order as a lawful order unless they could establish by the judgment of the court that they had reasonable grounds for their belief. As this, it was said, was what the respondents had to prove in the action, they were bound to give particulars of their case. The respondents, on the contrary, contended that they were invested with a duty and discretion in their office as Minister such that, if it was exercised in good faith (which was not in question), the interference with the appellant's liberty was lawful, and was not subject to the jurisdiction of the court. The discretion of the Home Secretary was, it was said, made final by the words of the statutory regulation. The terms of the regulation made immaterial the decision of a court as to the reasonableness in fact of the Home Secretary's belief. The only relevant question was whether the Secretary had a belief which to his mind was reasonable. In the words of Lord Finlay, L.C., in *R.* v. *Halliday, Ex p. Zadig* (3), at p. 269, in reference to the similar provision in the corresponding Defence of the Realm Regulations made during the last war :

> . . . no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law.

These conflicting contentions raised a question of principle. Counsel on each side have argued on the substance of the matter, putting aside technical questions of practice and pleading. What is involved is the liberty of the subject. Your Lordships have had your attention called to the evils of the exercise of arbitrary powers of arrest by the executive, and the necessity of subjecting all such powers to judicial control. Your Lordships have been reminded of the great constitutional conflicts in the seventeenth century, which culminated in the famous constitutional charters, the Petition of Right, the Bill of Rights, and the Act of Settlement. These struggles did indeed involve the liberty of the subject and its vindication against arbitrary and unlawful power. They sprang (to state it very broadly) from the Stuart theory that the King was King by Divine Right and that his powers were above the law. Thus a warrant of arrest *per speciale mandatum Domini Regis* was claimed to be a sufficient justification for detention without trial. By the end of the seventeenth century, however, the old common law rule of the supremacy of law was restored and substituted for any theory of royal supremacy. All the courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. That liberty, however, is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. It an Act of Parliament or a statutory regulation, like reg. 18B, which has admittedly the force of a statute, because there is no suggestion that it is *ultra vires* or outside the Emergency Powers (Defence) Act, 1939, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is as to the precise extent of the powers given. The answer to that question is only to be found by scrutinising the language of the enactment in the light of the surrounding circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. In the constitution of England, however, there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary, and they are limited to the period of the emergency.

I confess that, notwithstanding all my prejudices in favour of upholding the liberty of the subject, I have come to the clear conclusion that the courts below were right in refusing the particulars asked for. No reasons were given by the master, or by TUCKER, J., but in a later case, *Stuart* v. *Anderson and Morrison* (20), TUCKER, J., adopted in an action for unlawful imprisonment substantially what I regard as the true construction of reg. 18B. He said in effect that it was clear from the regulation that the decision on this difficult matter was not to be entrusted to one of His Majesty's judges, or to any *ad hoc* tribunal, but to the Home Secretary alone, and that the court has no jurisdiction to sit as an appellate tribunal on any decision of the Home Secretary, much less has the court power to try any case itself, in order to see if it would have come to the same conclusion as the Home Secretary if the legislature had entrusted the matter to a judge. The judge adds, as is obvious, that the court might no doubt be called upon to decide questions of *bona fides* or mistaken identity, if they should ever arise. I may further here refer to the judgment of the Court of Appeal in *Greene's* case (5), the appeal in which follows this appeal. I shall in due course examine that case, which raises technical questions on the law or practice applying to proceedings in *habeas corpus*, but the construction of the regulation is the substantial foundation of that case as well as of this. I ought, therefore, to advert here briefly to what was said on that issue. SCOTT, L.J., who gave the leading judgment, was of opinion that the decision of the Home Secretary was executive, and not judicial, and that the regulation made him the final judge of the reasonableness of the causes on which he took action. He said([1941] 3 All E.R., at p. 109):

> The whole regulation deals with a topic which is necessarily of a highly confidential character. It invites a decision, at least as a preliminary to action, by an executive Minister of the Crown, who occupies a position of the utmost confidence, who has at his disposal much secret information which ought not to be made public—above all during a war—who is under a duty to keep that information and its sources secret, and, finally, who cannot be compelled in any court to divulge what he considers ought not, in the national interest, to be divulged.

Later, MACKINNON, L.J., who agreed with SCOTT and GODDARD, L.JJ., said that the power of the Home Secretary to issue a valid order depended on the fulfilment of a condition, the existence of a state of mind in the Home Secretary—i.e., that he had reasonable grounds for believing certain facts to exist—and, by implication, that he honestly entertained that belief. GODDARD, L.J., I think, also treats the material issue to be the Home Secretary's state of mind.

I find support for this view in *R.* v. *Halliday, Ex p. Zadig* (3), a *habeas corpus* case arising during the last war on a regulation very similar in its general character to reg. 18B. There were differences in the language of reg. 14B, which was the enactment there in question, and the machinery was in some respects different. I am here only concerned with the general principles stated by this House. Their Lordships brushed aside an argument, not raised in the present case, that the regulation was *ultra vires* the statute. LORD SHAW OF DUNFERMLINE dissented on that point. He did not proceed on any doubt as to the meaning of the regulation, which, he held, if valid, vested in the Secretary of State, according to its terms, plenary discretion to arrest and detain a subject without trial. On that ground, he was of opinion that it was outside the delegated legislative power conferred by the Act, because there were no express words in the Act providing for imprisonment without trial. The majority of their Lordships held that the regulation was not *ultra vires*. Lord Finlay, L.C., said, at p. 269, that the measure was not punitive but precautionary. It was directed to taking precautions during the war against the dangers of espionage and sabotage, which experience showed to be so serious. He said, at p. 269 :

> No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee presided over by a judge of the High Court [which was the machinery under reg. 14B] is provided to bring before him any grounds for thinking that the order may properly be revoked or varied.

He added that the suggested rule as to construing penal statutes in favour of the liberty of the subject had no reference to a case dealing with an executive measure by way of preventing a public danger. These wise words were concurred in by Lord Dunedin, who added that preventive measures in the shape of internment of persons likely to assist the enemy might obviously be necessary and Parliament had risked the chance of abuse which is always theoretically present when absolute powers in general terms are delegated to an executive body, thinking that the restriction of the powers to the duration of the war was sufficient safeguard. Then Lord Atkinson said, at p. 271 :

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement . . . It must not be assumed that the powers conferred upon the executive by the statute will be abused.

These speeches embody statements of principle very relevant to the present case, and, notwithstanding differences in the particular enactments, furnished an important and direct precedent for the conferring of powers to exercise preventive detention upon his own responsibility on the Home Secretary, and, subject to theoretical exceptions not relevant here, ousting the jurisdiction of the court. In ordinary administrative measures, the legislative practice of substituting for the jurisdiction of the court that of a specially constituted tribunal is well-established, and increasingly frequent, particularly since the decision of this House in *Local Government Board* v. *Arlidge* (21). That case dealt with closing orders under the Housing, Town Planning, etc., Act, 1909. Lord Haldane, L.C., pointed out that in regard to these administrative orders [p. 132] :

> The jurisdiction both as regards original applications and as regards appeals was in England transferred from the courts of justice to the local authority and the Local Government Board, both of them administrative bodies.

It is true that the personal liberty of the subject is there not affected, but only his liberty to do what he likes with his own, but the principle is the same. Parliament excludes the jurisdiction of the courts and substitutes in the one case a specially constituted administrative body—

in a case like the present, the Secretary of State. In no case are ordinary legal rights to be affected, unless to the extent that Parliament has said. In reg. 18B, the Home Secretary is expressly empowered to make a detention order in the circumstances specified. What are these circumstances? They are a belief or mental state of the Minister. Except for the word "reasonable," which I shall later discuss, there is no reference to anything but his personal belief, because I think that actual belief is implied by the words "has reasonable cause to believe." His belief is something personal to himself. The reasonable cause can only be material in so far as it is an element present to his mind which determines his own belief. The "cause to believe" is part of the content of his mind. The matters specified, except hostile origins and perhaps hostile associations, are matters of opinion or judgment, not matters of fact. It is essentially a matter of expert and instructed conclusion or suspicion whether or not the acts in which the subject has been concerned were such as to be prejudicial to the public safety or defence of the realm. Even more obviously is the belief or decision that by reason thereof it is necessary to exercise control over him a matter of executive discretion. It is clear that the control is preventive, not punitive, and that the action is not judicial, but executive. The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand the suspect's right to personal liberty and on the other hand the safety of the state in the dire national peril in which during this war it has stood and stands. All the circumstances of national safety to which this House adverted in *R.* v. *Halliday, Ex p. Zadig* (3) are present in this war, only with vastly increased urgency and gravity, because German methods for effecting the poisonous infiltration among British or allied subjects of their purposes and schemes have been immensely more subtle and ingenious than in the last war. Even a judge may be allowed to take notice of the import of words like "fifth columnists," "quislings" and the like. It is the duty of the Secretary to check these underground and insidious activities of the enemy and their consequences, whether they result in sabotage, in anti-British propaganda, or in weakening the national effort and endurance. In reg. 14B, during the last war, the Minister could act only on the recommendation of a competent naval or military authority or of the advisory committee. There was, it seems, an external condition in that respect. In reg. 18B, that precondition is absent. The Secretary must now act on his own responsibility if he has reasonable cause to believe—that is, believes that he has in his own mind what he thinks is reasonable cause. If that is his mental state, the duty to act in the national interest attaches. That is a higher duty than the duty to regard the liberty of the subject. I cannot see any ground for holding that the performance of that duty is to be subject to the decision of a judge, who cannot possibly have the full information on which the Minister has acted, or appreciate the full importance in the national interest of what the information discloses. In these cases, full legal evidence or proof is impossible, even if the Secretary does not claim that disclosure is against the public interest, a claim which must necessarily be made in practically every case and a claim which a judge necessarily has to admit. To a large extent the sources of information must be secret. Espionage must be met by counter-espionage. Even to refuse the disclosure may give dangerous hints to the enemy. A hearing *in camera* is no doubt permissible (in particular under the Emergency Powers (Defence) Act, 1939, s. 6), but a hearing *in camera*, if the public called for full disclosure, would not satisfy the public conscience, and in matters of this delicacy leakage must inevitably take place. Counsel on each side refused to accept the suggestion that, at a trial where the issue was whether the Secretary was justified in making his order, the judge might say at some early stage that he was satisfied by what he had heard and stop the case, treating the onus as being on the defendant and holding that it was discharged. That, it seems to me, would be the travesty of a trial. I can imagine counsel for the plaintiff insisting that the case should be fully tried, that he was entitled to cross-examine the Secretary on a matter personal to himself, that part evidence might be edited and selected, that the judge could not decide the case unless he had all the evidence, and that the defendant (on whom, the appellant alleges, rests the burden of justifying the detention) must fail in his defence if he refuses to disclose material evidence, even on the ground that to disclose is against the national interest. In any case, neither the appellant nor the respondent was satisfied with the half-way house. However, on the construction of the regulation which I accept, the question does not arise.

These and other like considerations make the observation of LORD FINLAY, L.C., in *Halliday's* case (3), at p. 269, that no tribunal could be imagined less appropriate than a court of law for deciding these questions at least as applicable to reg. 18B as it was to reg. 14B under the earlier statute. I might go further and say that the court is not merely an inappropriate tribunal, but one the jurisdiction of which is unworkable and even illusory in these cases. In my judgment, a court of law could not have before it the information on which the Secretary acts, still less the background of statecraft and national policy which is what must determine the action which he takes upon it. I am confirmed in the opinion that the matter is one for executive discretion by other provisions in the regulation, in particular those relating to the advisory committee or committees which are to be appointed under para. (3) of the regulation by the Secretary of State, and which are to hear objections to, or in respect of, any order made under the regulation. Under para. (4), the Secretary is to give the person against whom the order is made the earliest possible opportunity of making representations to him in respect of the order, and to inform him of his right to make objections before the committee. The chairman of the committee is to inform the objector of the grounds (which I think means grounds of a general nature, such as hostile origin or associations), and also to give him such particulars as, in the opinion of the chairman, are sufficient to enable him to present his case. It is said on behalf of the appellant that such provisions are no substitute for a trial before an independent judge, and that the committees are chosen by the Secretary, who may decline to attend to their advice. This is true enough, but they go to show that the regulation is dealing with an executive discretion, in the exercise of which the discretion of the Minister is final. They seem to me to be inconsistent with the idea that recourse to a court of law by way of appeal against, or justification of, the order was open. Indeed, if that had been contemplated, I think that there must have been express words giving it. These provisions seem to me to be a substitute for a trial in court of the issues, no doubt inadequate in one sense, but as effective as the circumstances admit. I particularly rely in support of my conclusion on the circumstance that the Secretary is entitled to decline to follow the recommendation or advice of the committee. The responsibility is his alone.

Against all these arguments, however, the appellant relies on the use of the word "reasonable" as qualifying the "cause to believe." It is said that the word "reasonable" necessarily implies an external standard to be applied by someone other than the Secretary—namely, a judge. I cannot accept that contention, which seems to me to subordinate the whole substance of the enactment to a single word, which itself is ambiguous and inconclusive. The word "reasonable" does indeed imply instructed and intelligent care and deliberation, and the choice of the course which reason dictates, but the choice is not necessarily that of an outsider. If I am right in my view of the effect of the regulation, the choice can only be the choice of the Minister. All that the word "reasonable" then means is that the Minister must not lightly or arbitrarily invade the liberty of the subject. He must be reasonably satisfied before he acts. Nevertheless, it is still his decision, and not the decision of anyone else. If in ordinary affairs I say that I reasonably believe in the truth of certain facts or in the propriety of certain conduct, I am *prima facie* adopting as my reason my own judgment. If I mean to refer to some external yardstick, I should in general naturally say so expressly, unless the contrary was clear from other circumstances. "Reasonable" connotes a quality or characteristic. Who is to decide on reasonableness is a different matter, which depends on the circumstances. This disposes, to my mind, of the argument, strenuously urged on the basis of a number of decisions in which it has been held, that "reasonable" necessarily in every case imports what is reasonable in the judgment of a judge or a jury. That may be so when the particular conduct is properly subject to review in a court of law. When it comes before a court of law, the party impugned cannot be judge in his own cause. Thus, the shopwalker who takes the protesting woman customer into the manager's office as a suspected thief cannot, when he or the store is sued for false imprisonment, simply say as a sufficient answer that he thought he had reasonable cause. In that issue the judge must decide. This is equally true in a case of malicious prosecution (*Herniman* v. *Smith* (22)), and, when a lascivious youth under 23 years old is charged with having carnal knowledge of a girl under 16, it is not for him, but for the jury, to decide if he had reasonable grounds for his belief that she was not under 16 (*R.* v. *Banks* (23) and *R.* v. *Forde* (24)). Again, it is for the court to decide if a director sued under the Directors' Liability Act, 1890 (or the corresponding section of the present Companies Act), for untrue statements in a prospectus can establish his defence, which he cannot do by simply showing that he thought he had reasonable grounds for believing them to be true (*Alman* v. *Oppert* (25)). That is the very question in dispute which the court is required to decide. Similarly, the blackmailer is not the person to judge that he had reasonable cause for the demand (*Thorne* v. *Motor Trade Assocn.* (26)). Another class of illustrations of the same principle is found in the numerous statutes giving constables a power to arrest without warrant, by words like " reasonably suspects " or has " reasonable " or " good cause to suspect." A collection of these is to be found in Halsbury's Laws of England, Hailsham Edn., Vol. 9, pp. 72-94. In the present emergency regulations, similar powers to arrest are given by similar words. Clearly in those cases the constable is not to be judge in his own case. I need not multiply citations or give further illustrations of what is so familiar in our law, and has been for many, many years, but the whole basis in these cases is that the jurisdiction of the court is invoked to decide a triable issue within its legal competence. What is reasonable in the particular case is then determined by what the court or the jury thinks reasonable. On the view which I have formed that there is under reg. 18B no triable issue as to reasonableness for the court, these authorities cease to be of any value. As the administrative plenary discretion is vested in the Home Secretary, it is for him to decide whether he has reasonable grounds, and to act accordingly. No outsider's decision is invoked, nor is the issue within the competence of any court. The legislature must vest the emergency discretion in someone, and I have explained my opinion that the Secretary of State has been chosen as being the only appropriate person. He alone can have the materials for exercising the discretion. Like other discretions, it must involve some latitude of choice. There is no hard-and-fast issue of fact, such as there is in the trial of a specific charge on indictment. In our modern system of government, the Home Secretary, though he is not in these matters amenable to the court, and though impeachment has been obsolete for over a century, still is generally responsible to Parliament, quite independently of his duty under reg. 18B (6) to report to Parliament at least once a month as to the action he has taken, including the number of persons detained, and as to the number of cases each month in which he has declined to follow the advice of the committee, which is some check, though it may be said that this is not a very effective check, because he is not required A to give the names of those detained. If, however, the sense of the country were outraged by the system or practice of making detention orders, or, indeed, by any particular order, it could make itself sufficiently felt in the press and in Parliament to put an end to any abuse, and Parliament can always amend the regulation.

B It was, however, contended on behalf of the appellant that a different construction must be adopted by reason of comparing the language of reg. 18B in its present form with its language when it was originally made on Nov. 23, 1939, S.R. & O., 1939, No. 1681. Counsel for the appellant knew English law too well to contend that they were entitled to refer to C what passed in debate in the House of Commons or the House of Lords. That is clearly inadmissible, if, indeed, anything relevant was said on the point in Parliament, about which I know nothing. In *Arlidge's* case (21), LORD HALDANE, L.C., in reference to a conflict of opinion as to whether guidance was to be found in the analogy of procedure in a court D of law, said, at p. 130:

> . . . which of these opinions was right can only be determined by referring to the language of the legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing what Parliament had in its mind, excepting as far as the language enables us to do so.

In *Assam Railways & Trading Co., Ltd.* v. *Inland Revenue Comrs.* (27), E it was observed, at p. 458:

> It is clear that the language of a Minister of the Crown in proposing a measure which afterwards becomes law is inadmissible.

However, an earlier measure which is superseded by the measure in question may be referred to as a historical fact and as giving information F as to some evil or defect which was being remedied. The point which was emphasised by the appellant in this appeal was that the language used in the earlier form of the regulation was different, in that it omitted the word "reasonable." The paragraph was:

> The Secretary of State, if satisfied with respect to any particular person that with G a view to preventing him from acting in any manner prejudicial to the public safety or the defence of the realm may make an order . . .

It is, as I apprehended, not contested that under this earlier form of the regulation the matter was left to the discretion of the Secretary, but it was contended that the change from "if satisfied" to "if he has H reasonable cause to believe" made all the difference, and converted the plenary power of the Secretary into a power the exercise of which was subject to the judgment of a court of law. Such, it was said, was the compelling force of the word "reasonable" that by itself it overrode every consideration, however peremptory. It inexorably excluded the idea of a merely executive discretion, and introduced the opinion of a court instead. I have already rejected that construction of the actual language in the present form of the regulation. The actual language is the acid test, and I see no ground for attaching so much weight to so slight a difference in words. "Satisfied" must mean "reasonably satisfied." It cannot import an arbitrary or irrational state of being satisfied. I find the distinction between "reasonably satisfied" and "has reasonable cause to believe" too tenuous. The original reg. 18B was very much slighter and shorter in all respects. That is at once apparent by comparing the words I have quoted from it with the words of the later edition of the regulation. There was nothing in the former corresponding to paras. (4), (5) and (6) of the latter, which are obviously important safeguards for the objector. I do not find in the later edition any indication of evils to be cured, but, if defects are to be remedied, it is to be done by extending the Home Secretary's power, on the one hand, and, on the other, enlarging the specified safeguards of the subject. It does not in terms provide for review by the court. In my opinion, if it were ever intended to make so drastic a change in the whole scheme as to make the Home Secretary's grounds of belief examinable by a judge, it should, and would, have been enacted by express words. I attach little importance in this context to the question whether the words used are "satisfied" or "has reasonable cause to believe." For instance, both phrases seem to be used indifferently in reg. 18B (1A), which was added on May 22, 1940. Nor can I derive any light from comparing or contrasting the use in different places in these regulations of phrases like "it appears," "is satisfied," "has reasonable cause." This collection of regulations is more like a *fasciculus* of different enactments, many made at different dates, than a single statute. Even in the same statute, the same words may be used in different senses at different places, as was recently held by this House in *Barnard* v. *Gorman* (15). It is also old and familiar law that words which in one statute are given a particular meaning are not necessarily to be construed, when they are found in another statute, as having the same meaning. This principle of construction is discussed in *Cox* v. *Hakes* (28), especially by LORD HALSBURY, at pp. 516, 517. The present form of reg. 18B is different in material particulars from the original form, and must be construed as it stands. I think that the correct construction is what I have put upon it. Finally the principles applied by this House in *R.* v. *Halliday, Ex p. Zadig* (3), are, in my judgment, equally applicable to reg. 18B.

I must shortly deal with two minor matters which have been adverted to. In the first place, para. (8) of the regulation does not, in my opinion render lawful a detention which is, apart from para. (8), unlawful, and unwarranted by the Secretary's powers. It is inserted to settle possible doubts as to prison law and practice. The other matter for comment is the decision in *Eshugbayi Eleko* v. *Nigerian Government (Administering Officer)* (29), where the government claimed to exercise certain powers, including deportation, against the appellant. The appellant applied for a writ of *habeas corpus*, on the ground that the ordinance relied on gave by express terms the powers it contained only against one who was a native chief, and who had been deposed, and where there was a native custom requiring him to leave the area, whereas actually not one of these facts was present in the case. It was held in effect that the powers given by the ordinance were limited to a case in which these facts existed. It was a question of the extent of the authority given by the ordinance. That depended on specific facts, capable of proof or disproof in a court of law, and, unless these facts existed, there was no room for executive discretion. This authority has, in my opinion, no bearing in the present case, as I construe the powers and duties given by the regulation. There are also obvious differences between the ordinary administrative ordinance there in question and an emergency power created to meet the necessities of the war, and limited in its operation to the period of the war. The powers cease with the emergency. That period, however, still continues, and, it being assumed that the onus is on the respondents in this action of unlawful imprisonment, the onus is sufficiently discharged, in my opinion, by the fact that the order was made by a competent authority within the ambit of the powers entrusted to him and was regular on its face. I agree with the decision of the courts below, and am of opinion that the appeal should be dismissed.

LORD ROMER: My Lords, the decision of this appeal must, as it seems to me, turn ultimately upon the true meaning of a few words in the Defence (General) Regulations, 1939, reg. 18B (1), made under the Emergency Powers (Defence) Acts, 1939 and 1940. Para. (1) provides as follows:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

The question of construction arising under the regulation is this. Before an order can be made by the Secretary of State, is it necessary that there should in fact exist reasonable grounds for his belief, or is it sufficient that there are grounds for his belief which appear to him to be reasonable? The form in which that question is brought before your Lordships for decision in the present case is somewhat unusual. The appellant is a gentleman who, ever since May 29, 1940, has been detained in Brixton Prison by reason of an order, dated May 26, 1940, and purporting to have been made under the regulation by Sir John Anderson when Home Secretary. The order is prefaced by a recital as follows:

> Whereas I have reasonable cause to believe Jack Perlzweig @ Robert Liversidge to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him . . .

On Mar. 14, 1941, the appellant began this action as plaintiff against Sir John Anderson as the first defendant and Mr. Morrison (who had succeeded Sir John as Home Secretary on Oct. 4, 1940) as second defendant, claiming as against both defendants damages for false imprisonment, and as against Mr. Morrison an injunction restraining him from continuing the imprisonment of the plaintiff. In due course, the plaintiff delivered his statement of claim. In it he stated that Sir John Anderson had by a "document" dated May 26, 1940, and "expressed" to be a detention order under the regulation, ordered and directed the plaintiff to be detained. He then alleged that in consequence and by reason of that order and direction he had been, and still was, detained and imprisoned, and that since Oct. 4, 1940, his detention and imprisonment had been continued by Mr. Morrison, who refused to release him. He concluded his allegations as follows:

> (6) In the premises the defendants have and each of them has caused and procured the unlawful detention and imprisonment of the plaintiff and the second-named defendant continues and intends to continue the same.

It is to be observed that, inasmuch as the plaintiff is plainly alleging that he is detained in consequence and by reason of the order of Sir John Anderson given by the document expressed to be an order under the regulation, his assertion that his detention was and is unlawful must necessarily mean that the document was not a valid order. He does not, however, state in what respect the document is invalid, and upon that pleading it would have been open to him to attack it upon several grounds, as, for example, that the regulation was *ultra vires*, or that Sir John did not honestly believe that the plaintiff was of hostile associations and that by reason thereof it was necessary to exercise control over him, or that, if Sir John did so believe, there did not exist in fact any reasonable grounds for such belief. It might, indeed, have been the plaintiff's case, for all that appears to the contrary on the statement of claim, that he was attacking the validity of the order on the ground of non-compliance by the Home Secretary or the chairman of the advisory committee with the duty imposed upon them respectively by paras. (4) and (5) of reg. 18B. In these circumstances, the defendants might reasonably have applied for particulars of the alleged invalidity of the order. They did not do so, however, and delivered their defence, which contained, amongst others, the following paragraphs:

> (3) The defendants admit that the first-named defendant ordered that the plaintiff should be detained under the Defence (General) Regulations, 1939, reg. 18B . . . (5) None of the allegations contained in para. (6) of the statement of claim is admitted.

Thereupon the plaintiff issued a somewhat remarkable summons. He asked by it that para. (3) of the defence should be struck out, upon the grounds that it purported to admit something which was not pleaded in the statement of claim. He asked, alternatively, that the defendants should be ordered to give particulars of (*a*) the grounds upon which the first defendant had reasonable cause to believe the plaintiff to be a person of hostile associations, and (*b*) the grounds upon which the first defendant had reasonable cause to believe that, by reason of such hostile associations, it was necessary to exercise control over the plaintiff. Para. (3) of the defence, however, contained no allegation, express or implied, that the first defendant believed the plaintiff to be a person of hostile associations, or believed that, by reason of his hostile associations, it was necessary to exercise control over him. The paragraph merely contained an admission that the first-named defendant had ordered the plaintiff to be detained under reg. 18B. Nor was there any ground which I can see for striking it out. The master very properly dismissed the summons, and the appeal against his order was dismissed by Tucker, J. The plaintiff then appealed to the Court of Appeal. Before that court, the plaintiff abandoned his claim to have para.(3) of the defence struck out, but obtained leave to amend his summons by asking that the particulars should, in the alternative, be given under para. (5) of the defence. There was some sort of justification for seeking this alternative relief, inasmuch as the refusal to admit that the detention of the plaintiff was unlawful impliedly asserted that it was lawful, and, accordingly, that there were in fact reasonable grounds for the belief of the Home Secretary recited in the order, assuming that, according to the true construction of the regulation, the existence in fact of such reasonable grounds was essential to the validity of the order. On the pleadings as they stood, however, there was nothing to indicate that the plaintiff was attacking the validity of the order on the want of such reasonable grounds, and, if he were not, the existence or non-existence of those grounds was not an issue in the action. However, the plaintiff's summons might perhaps be regarded as serving the double purpose of giving particulars of his statement of claim and asking for particulars of the defence. The Court of Appeal must, I think, have so regarded it, for they proceeded upon the footing that the existence or non-existence in fact of such reasonable grounds was put in issue by the pleadings, and merely addressed their minds to the question of whether, on the trial of that issue, the onus of proof would lie upon the plaintiff or upon the defendants. The court decided that it would lie upon the plaintiff, and dismissed the appeal solely upon that ground.

My Lords, it is, I think, apt to lead to confusion if the question be regarded as one of onus. The appellant having been detained by, or by the direction of, the defendants, the onus of justifying the detention clearly lies upon them. The real question to be decided is how that onus is to be discharged. Is it discharged by production of the order purporting to be made by Sir John Anderson under the regulation, or must the defendants prove in addition that the order was justified in the circumstances? The Court of Appeal decided that mere production of the order was (in the first instance, at any rate) sufficient. MacKinnon, L.J., said ([1941] 2 All E.R., at p. 615) :

> If, at the trial, the plaintiff merely proved that he was detained in prison by an order of the first defendant, and nothing more, and if the defendants then proved that he was detained by an order issued pursuant to the regulation and signed by the first defendant . . . and if that was the whole of the evidence, we think that there would have to be judgment for the defendants.

If the Court of Appeal were right in thinking that mere production of the order and proof of the signature of Sir John Anderson would sufficiently discharge for the time being the onus which lay upon the defendants of justifying the detention, the plaintiff's application for particulars at this early stage of the action was rightly dismissed. However, even if the view entertained by the Court of Appeal as to the production of the order be accepted, it would merely result in postponing to a later date the decision of the crucial question in the case, for it is obvious that at the trial the plaintiff would not be content with merely proving that he was detained in prison. He would assuredly call some evidence in support of his case that he was not a person of hostile associations, and thereupon, as the Court of Appeal foresaw, the defendants might, upon one construction of the regulation, have to call rebutting evidence, and the further trial might even have to be postponed if such evidence proved embarrassing to the plaintiff by way of surprise or novelty. MacKinnon, L.J., added ([1941] 2 All E.R., at p. 615):

> Conceivably, in a proper case, the judge might at that stage make some order by way of particulars of the allegations of the defendants.

Sooner or later, therefore, and in some form or another, it would have to be decided whether the defendants could be compelled to disclose the grounds upon which the belief of Sir John Anderson was founded, or, in other words, whether, before an order can be made under the regulation, there must exist in fact reasonable grounds for the belief of the Home Secretary upon which the order is founded, or whether it is sufficient that he *bona fide* believes that there are such grounds. If the latter construction is to prevail, no order for particulars such as the plaintiff seeks in this case can be made, for, if at the trial the Home Secretary gives rebutting evidence to the effect that, in his opinion, there were reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily be accepted unless it can be shown that he was not acting in good faith, and the onus of showing this would lie upon the plaintiff. The materials upon which the Home Secretary founded his opinion would be wholly irrelevant, and could not be inquired into by a court of law.

The question of the proper construction of the regulation, a question which does not appear to have been discussed in the Court of Appeal, is, therefore, one of considerable importance, for the considerations to which I have just referred will apply to the case of every person who is detained by an order made under the regulation, whether he seeks to question the validity of the order by an action for false imprisonment or by an application for a writ of *habeas corpus*.

My Lords, that this question is not only of importance but is also one of considerable difficulty appears sufficiently from the fact that it has given rise to a difference of opinion among your Lordships. After giving the matter my most earnest consideration, however, I have come to the clear conclusion that the construction for which the respondents are contending must be accepted. The arguments in favour of the other construction addressed to this House as well by counsel for the appellants in the present case as by counsel for the appellants in *Greene's* case (5) are undoubtedly of considerable force, but to accede to them would, or might in certain cases, lead to a result which neither Parliament nor the framers of the regulation could by any possibility have intended. Take, for instance, the case of a person against whom an order for detention has been made because the Secretary of State believes him to have been recently concerned in acts prejudicial to the public safety or the defence of the realm. If that person brings an action for false imprisonment, or moves for a writ of *habeas corpus*, the Secretary of State may be placed in the dilemma of having to make public information the disclosure of which may imperil the security of Great Britain or of having to refuse to disclose it, with the result that the person detained, who may be a dangerous fifth columnist, will be released and set at liberty to continue his traitorous activities. For, if the question of whether the Secretary of State had reasonable grounds for the belief on which his order was founded is one for a court of law to determine, it is plain that the court must be placed in full possession of all the relevant facts, and, if some of those facts are withheld from it, even though it be by reason of public policy, it will have no option but to say that no reasonable grounds for his belief have been shown to exist, and the release of the detained person will follow as a matter of course. The Emergency Powers (Defence) Act, 1939, and the regulation will, in that particular case, have failed to remedy the mischief against which they were designed. What that mischief was sufficiently appears from sect. 1 (1) of the Act. So far as is material for the present purpose, it is in these terms:

> . . . His Majesty may by order in council make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm . . . and the efficient prosecution of any war in which His Majesty may be engaged . . .

Moreover, Part I of the general regulations made in pursuance of the section, in which part reg. 18B (1) is to be found, is entitled "Provisions for the Security of the State." It was indeed said on behalf of the appellant in Greene's case that, where an Act of Parliament is capable of more than one construction, the courts will adopt that construction which is the least likely to lead to an invasion of the liberty of the subject. That in general is a very salutary rule, but we are dealing here with an Act passed, and regulations made under it, in times of a great national emergency, and, in view of this circumstance, and of the objects which that Act and those regulations so plainly had in view, the courts should, in my opinion, prefer that construction which is the least likely to imperil the safety of this country. In this connection, it is not inapposite to quote the following passage from the opinion of Lord Atkinson in *R.* v. *Halliday, Ex p. Zadig* (3), at p. 271:

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement.

It was urged on behalf of the appellant that there is no reason to fear that the Secretary of State will ever find himself placed in the dilemma to which I have referred, inasmuch as the trial of an action for false imprisonment or the proceedings in *habeas corpus* can always be heard *in camera*. So they can, but I am not at all impressed by this A argument. Where the information in the possession of the Secretary of State is of such a nature that Great Britain might be seriously prejudiced if it came to the ears of the enemy, the serious risk of leakage would inevitably deter him from disclosing it. A man who is willing to risk his liberty and his life in maintaining a traitorous intercourse B with the enemy is not likely to be deterred from passing on such information by the penalties attaching to a disclosure of what has taken place at proceedings *in camera*.

It was strongly urged on behalf of the appellant that the expression "if he has reasonable cause to believe" and similar expressions are C well known to English law, which has consistently regarded them as postulating the existence in fact of reasonable grounds for belief. I will assume that this is so, but the context and circumstances in which they are used may force one to the conclusion that even the most familiar words and expressions are used in other than their ordinary meaning, D and this is the case here, for the person who is to have reasonable cause to believe is not some minor official holding a subordinate position. He is the Secretary of State. Moreover, the acts concerning which the belief is to be entertained are not some infractions of our municipal law committed in times of peace. They are (amongst them) acts pre- E judicial to the public safety or the defence of the realm committed in a time of grave national danger, and of such a nature that "by reason thereof" it is necessary to exercise control over the person suspected of committing them. Whether or not the acts of some individual appear to be of this description is a question of which the Secretary of State F must plainly be a better judge than any court of law can be. As LORD FINLAY, L.C., said in *R.* v. *Halliday, Ex p. Zadig* (3), at p.269 :

> It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law.

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I respectfully agree. I cannot believe that the legislature or the framers of the regulation ever intended to constitute the courts of England the ultimate judges of the matters in question. On the contrary, there are to be found in the language of both the statute and the regulation indications that the final determination of all such matters was to lie H with the Secretary of State alone. By sect. 1 (2) of the Act, for instance, it is provided, amongst other things, that regulations may be made for the detention of persons whose detention "appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm." It does not, of course, follow that, because there was authority given to clothe the Secretary of State with this wide discretionary power, the regulation has in fact done so, but the subsection indicates the view of the legislature as to the powers which ought to be given him in order to secure the safety of the realm, and it is not unreasonable to suppose that the framers of the regulation desired to give full effect to these views. It is, moreover, to be observed in this connection that, whereas paras. (3), (4) and (5) of reg. 18B provide for the setting up of one or more advisory committees to whom a person aggrieved by the making of an order against him can make his objections, it is made plain by para. (6) that the Secretary of State need not follow the advice given by any such committee. It is also to be noticed that the words of para. (1) are not "if there *is* reasonable cause to believe," but "if the Secretary of State has reasonable cause to believe." It is, of course, true, as has been said by my noble and learned friend Lord Atkin, that the words "If a man has a broken ankle" do not and cannot mean "If a man thinks he has a broken ankle," but the regulation is not dealing with the state of a man's body. It is dealing with the state of a man's belief, or, in other words, with the state of his thoughts. The words "If a man has a belief that a certain thing exists" necessarily mean, "If he thinks that the thing exists," and the word "has" may well have been used in the regulation for the purpose of indicating that it is throughout concerned with the impression which is created upon the mind of the Secretary of State, and not with the impression created upon a court of law. Not only is the belief to be his, but the estimate of the reasonableness of the causes which have induced such belief is also to be his, and his alone.

The attention of your Lordships was very properly drawn by way of contrast to the language used in some of the other regulations, such, for instance, as reg. 2c (1), as showing that, when it was intended to leave a decision to the unfettered discretion of the Secretary of State, the regulations did so in plain terms. There would be more force in this argument if all the regulations were contained in one Act of Parliament or in a set of regulations all framed at one time, though, in view of the fact that different language is frequently employed in the regulations for the purpose of expressing the same thing, I should not, even in that case, have been greatly impressed by it. However, the regulations, and even some of the paragraphs in the same regulation, came into existence at different times, and, for all I know to the contrary, were the product of different hands. In these circumstances, it is impossible to infer that a difference in the language used in two regulations necessarily indicates an intention to express two different meanings. My Lords, for these reasons I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Buckeridge & Braune* (for the appellant); *Treasury Solicitor* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

GREENE *v.* SECRETARY OF STATE FOR HOME AFFAIRS.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Macmillan, Lord Wright and Lord Romer), **September 23, 24, October 3, 1941.**]

Crown Practice—Habeas Corpus—Return to writ—Inquiry into truth of return—Habeas Corpus Act, 1816 (*c.* 100) *ss.* 3, 4.

Emergency Legislation—Imprisonment under defence regulation—Person of hostile associations—Validity of order—Sufficiency of affidavit by Home Secretary stating bona fide belief—Sufficiency of return to writ of habeas corpus—Habeas Corpus Act, 1816 (*c.* 100), *ss.* 3, 4*—Defence* (*General*) *Regulations, reg.* 18B*—R.S.C., Ord.* 59.

The appellant was arrested on May 24, 1940, under an order made by the Home Secretary on May 22, 1940, in pursuance of the Defence (General) Regulations, reg. 18B. The order stated that the appellant was a person of hostile associations and that, by reason thereof, it was necessary to exercise control over him. The appellant applied for an order for his release under R.S.C., Ord. 59. By clause 3 of the Defence (General Regulations, reg. 18B, a person in the position of the appellant has a right to appeal to an advisory committee. The notice to the appellant by the chairman of the advisory committee stating the grounds for his detention was inaccurate in certain particulars :—

HELD : (i) in such a case an affidavit by the Home Secretary stating his belief in the reason given for the appellant's detention in the order was sufficient, and it was unnecessary that he should state his grounds for such belief.

(ii) where the return (or the affidavit showing cause) exhibits an order of commitment regular on its face, it is a complete answer to the application, and this is so even where the matter is one within the Habeas Corpus Act, 1816. There was, therefore, in this case no need for an affidavit by the Home Secretary.

(iii) it being found as a fact that the appellant was not prejudiced by the discrepancy, the mistake in the notice by the chairman of the advisory committee could not invalidate an originally good order.

Decision of the COURT OF APPEAL ([1941] 3 All E.R.) 104 *affirmed.*

[**EDITORIAL NOTE.** On the main question the House has simply adopted its decision in *Liversidge* v. *Anderson*, p. 338, *ante.* LORD ATKIN did not dissent in this case, being satisfied that the documents in the case plainly showed that there was reasonable cause for the belief of the Home Secretary. The principle question here discussed is one of procedure. It is shown that at common law the return to a writ of *habeas corpus* could not be controverted. This position, as to writs in a criminal or supposed criminal matter or in the case of persons imprisoned for debt or by process in any civil suit, was altered by the Habeas Corpus Act, 1816, which, subject to the limitation just mentioned, permitted the court to inquire into the truth of the facts set forth in the return. It is pointed out, however, that where a person is detained in pursuance of an order made under reg. 18B, the only effect of this is that the applicant, if he can, is at liberty to show that he is not the person named in the order, or that no such order was in fact properly made. Of course, had the decision in *Liversidge* v. *Anderson*, p. 338 *ante,* been that the court was entitled to inquire into the exercise of the discretion on the part of the Home Secretary, this could also have been inquired into by affidavit, but the decision in that case has finally excluded any inquiry of that kind.

AS TO DETENTION UNDER EMERGENCY REGULATIONS, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 622 ; and FOR CASES, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to :

(1) *Liversidge* v. *Anderson and Morrison*, [1941] 3 All E.R. 338 ; Digest Supp.

(2) *Carus Wilson's Case* (1845), 7 Q.B. 984; 16 Digest 260, *650*; 14 L.J.Q.B. 105, 201; 4 L.T.O.S. 311, 353, 373; 5 L.T.O.S. 52.

(3) *Ex p. Lees* (1858), E.B. & E. 828; 16 Digest 251, *517*; 31 L.T.O.S. 247; *sub nom. R.* v. *Lees*, 27 L.J.Q.B. 403.

(4) *Re Newton* (1855), 16 C.B. 97; 16 Digest 254, *550*; 24 L.J.C.P. 148; 25 L.T.O.S. 99.

A (5) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 16 Digest 250, *508*; 60 L.J.Q.B. 89; 63 L.T. 392.

(6) *Hobhouse's Case* (1820), 3 B. & Ald. 420; 16 Digest 248, *464*.

(7) *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; 16 Digest 265, *720*; *sub nom. R.* v. *Evans & Wheelton*, 9 L.J.Q.B. 82.

(8) *Watson's Case* (1839), 9 Ad. & El. 731; 16 Digest 256, *585*; *sub nom. R.* v.
B *Wixon*, 8 L.J.Q.B. 129.

(9) *Darnel's Case* (1627), 3 State Tr. 1; 16 Digest 263, *693*.

(10) *R.* v. *Jackson*, [1891] 1 Q.B. 671; 15 Digest 827, *9057*; 60 L.J.Q.B. 346; 64 L.T. 679.

(11) *Barnardo* v. *McHugh*, [1891] A.C. 388; 16 Digest 270, *793*; 61 L.J.Q.B. 721; 65 L.T. 423; *affg.* S.C. *sub nom. R.* v. *Barnardo, Jones's Case*, [1891]
C 1 Q.B. 194.

(12) *Bushell's Case* (1670), Vaugh. 135; 16 Digest 262, *664*.

(13) *R.* v. *Browne, Corbet, etc.* (1686), 2 Show. 484; 16 Digest 250, *497*.

(14) *R.* v. *Halliday, Ex p. Zadig*, [1917] A.C. 260; 2 Digest 198, *560*; 86 L.J.K.B. 1119; 116 L.T. 417.

(15) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72; Digest Supp.; 110
D L.J.K.B. 42; 164 L.T. 41.

APPEAL by the appellant, Ben Greene, from an order of the Court of Appeal, dated July 30, 1941, and reported [1941] 3 All E.R. 104. The facts are fully set out in the opinion of VISCOUNT MAUGHAM.

E *H. St. John Field, K.C.*, and *J. W. Williamson* for the appellant.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and *Valentine Holmes* for the respondents.

VISCOUNT MAUGHAM [read by LORD MACMILLAN]: My Lords, this
F is an appeal from an order of the Court of Appeal, dated July 30, 1941, confirming an order of the King's Bench Division, dated May 2, 1941, refusing the application of Benjamin Greene, the appellant, for a writ of *habeas corpus* to issue. The appellant is at present detained in His Majesty's Prison, Brixton, under an order purporting to be made under
G the Defence (General) Regulations, 1939, reg. 18B (being regulations made under the Emergency Powers (Defence) Act, 1939). The question for decision on the appeal to your Lordships is whether the appellant is entitled to have a writ of *habeas corpus* issued directed to the respondents. The Divisional Court (HUMPHREYS, SINGLETON and TUCKER, JJ.) decided
H in the negative, and their judgment was affirmed by the Court of Appeal (SCOTT, MACKINNON and GODDARD, L.JJ.).

The order or detention was made by the respondent, the then Secretary of State for Home Affairs, and was in the following terms:

> Defence (General) Regulations, 1939. Detention Order.
>
> Whereas I have reasonable cause to believe Ben Greene of The Hall Cottage, Berkhamsted, to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him: Now, therefore, I in pursuance of the power

conferred on me by the Defence (General) Regulations, 1939, reg. 18B, make the following order:

I direct that the above-mentioned Ben Greene be detained.

John Anderson.
One of His Majesty's Principal Secretaries of State.

May 22, 1940.

The appellant, according to modern practice (R.S.C., Ord. 59), applied *ex parte* to the Divisional Court for the issue of the writ, and his application was adjourned to be heard after notice to the respondent. The appellant filed affidavits in support of his application, making (so far as now material) two submissions. The first was that the order was and is bad, because Sir John Anderson never had reasonable, or any, cause for believing that the appellant had been recently concerned in acts prejudicial to the public safety and the defence of the realm and in the preparation and instigation of such acts and that it was necessary to exercise control over him. The second was based on a very regrettable error made by the chairman of the advisory committee appointed under reg. 18B (3), or his officer, in informing the appellant of the grounds on which the order had been made against him (reg. 18B (5)). He submitted that he had been prejudiced in his hearing before the advisory committee by reason of this circumstance.

The respondent filed an affidavit in which, *inter alia*, he said:

> Before I made the said order I received reports and information from persons in responsible positions who are experienced in investigating matters of this kind and whose duty it is to make such investigations and to report the same to me confidentially. I carefully studied the reports and considered the information and I came to the conclusion that there was clear cause to believe and I did in fact believe that Benjamin Greene was a person of hostile associations and that by reason thereof it was necessary to exercise control over him.
>
> A copy of the detention order was sent by me to the advisory committee appointed under Regulation 18B of the Defence (General) Regulations, 1939, on 31 May, 1940. I am unable to say how the error occurred in the document which is exhibit BG.2 to Mr. Greene's affidavit. The error is an error in the statement of my reasons for making the order and there is no error in the particulars. I submit that the error cannot have prejudiced Mr. Greene as he had had a copy of the detention order, as he admits in his affidavit, and I have caused inquiries to be made and have ascertained that he took no exception before the advisory committee to the terms of the document BG.2. The advisory committee duly reported to me. After again considering all the information about the case, including the committee's report, I was confirmed in my belief that Mr. Greene was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. Accordingly I decided to maintain the existing detention order.

The respondent's affidavit, moreover, stated that he had satisfied himself that the appellant was and is a person of hostile associations, and that by reason thereof it was necessary to exercise control over him.

The remainder of the evidence in the affidavits related almost entirely to the complaint as to the statement of grounds for his detention sent to him by the chairman of the advisory committee, and certain other matters which are not now relied upon by the appellant. The judges in the Divisional Court and the lords justices in the Court of Appeal have found that the appellant was not in fact prejudiced by the error in the document sent to him by the advisory committee. He was aware of the error, and did not suggest to the advisory committee that it prejudiced him in any way, and the particulars given in the document covered the actual ground on which he had been detained.

I shall first deal with the question whether a writ of *habeas corpus* ought to be issued. My Lords, a somewhat similar appeal to this House in *Liversidge* v. *Anderson and Morrison* (1) has just been decided. It was based on an order of detention made by the Secretary of State under the Defence (General) Regulations, 1939, reg. 18B, and it raised the same question as to the true construction of the words "If the Secretary of State has reasonable cause to believe." Your Lordships there decided that those words, in the context in which they are found, refer simply to the belief of the Secretary of State, based on his view as to there being reasonable cause for the personal belief which justifies the detention order. That opinion is, of course, binding on your Lordships, and none the less so because in the earlier appeal the question arose in an action of false imprisonment, while here it arises on an application for a writ of *habeas corpus*. Your Lordships also expressed the opinion that the Secretary of State could not be called upon to disclose his information or grounds of belief if he took the view that it would be contrary to the public interest to do so. These two propositions must be borne in mind in considering the propriety of acceding to the application for the issue of a writ of *habeas corpus*.

My Lords, I am certain that this House would be very unwilling to curtail or diminish the rights of an applicant for a writ of *habeas corpus ad subjiciendum*, but we are, of course, sitting in a judicial capacity, and are bound by the law as it exists. It is inaccurate to say, as some have said, that the writ is applicable as a remedy in *all* cases of wrongful deprivation of personal liberty. What the judges of the High Court can do at the instance of the imprisoned person is to command the production of the person and to inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. However, there are many cases, and in particular those of a criminal, or supposed criminal, character, in which a return to the writ (to use the old-fashioned phrase) cannot be traversed or impeached by affidavit: *Carus Wilson's Case* (2), *Ex p. Lees* (3) and *Re Newton* (4). On the other hand, in cases other than for some criminal, or supposed criminal, matter, and except cases of imprisonment for debt or by process in any civil suit, the judge is empowered by the Habeas Corpus Act, 1816, s. 3, *although the return to the writ be sufficient in law*, to examine into the truth of the facts therein set forth by affidavit or by affirmation, and, if the truth of the facts returned appears to him doubtful, he may bail the party and transmit the writ, return, etc., to the court of which he is a judge, whereupon:

> . . . it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return, in a summary way by affidavit . . . and to order and determine touching the discharging . . .

In my opinion, the present case is within sects. 3 and 4 of that Act, since no charge of a criminal, or supposed criminal, nature is brought against the appellant, and it is not within the other exceptions mentioned in the Act. The order relied upon in the return is an order made by a Secretary of State purporting to act under reg. 18B made pursuant to, and within the provisions of, the Emergency Powers (Defence) Act, 1939. It is, however, not an order of a court of justice, for the Secretary of State was acting as an executive officer in a matter of administration. It is important to note that his good faith in the matter is not challenged. The only *fact*, therefore, which could be examined as regards its truth pursuant to the terms of the Act (assuming the order itself to be admitted or proved) is whether the Secretary of State had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him At common law, apart from the Habeas Corpus Act, 1816, the return could not be disputed. The proper court to examine the alleged fact under the modern practice (R.S.C., Ord. 59) is the Divisional Court. Affidavits were filed on both sides. The court accepted the accuracy of the statements in the affidavits of the two respondents and thought there was ample evidence to enable it to come to the conclusion that Sir John Anderson had reasonable cause to believe the appellant to be a person of hostile associations and that by reason thereof it was necessary to exercise control over him. I should hesitate to differ from the Divisional Court in such a case, but I must add that, in my opinion, this conclusion, which was also that of the Court of Appeal, was right. If so, it follows that the return was a good return, that the application for the writ properly failed, and that this appeal must be dismissed.

We have been asked to express an opinion as to whether any affidavit by the Secretary of State was necessary, and this question is a little more difficult. Those who desire to understand the history and practice in relation to the writ of *habeas corpus* prior to the Act of 1816 must study the very learned and elaborate opinion on the writ of *habeas corpus* delivered by Wilmot, C.J., on May 9, 1758, to the House of Lords (Opinions and Judgments Delivered by Sir John Eardley Wilmot, 1802, pp. 77-129). The tenth question was as to whether the judges were bound by the facts set forth in the return

> . . . although it should appear most manifestly to the judges by the clearest and most undoubted proof that such return was false in fact.

In his opinion, Wilmot, C.J., dealt first with cases of imprisonment for criminal offences and next with imprisonment in civil matters. In the former cases, he points out, it is impossible to go out of the return if the court who dealt with the case had jurisdiction in the matter, and the court on *habeas corpus* must accept the facts stated in it as true. He observes in very simple and apposite language, at p. 107 :

> The court says [to the gaoler] "Tell the reason why you confine him." The court will determine whether it is a good or bad reason ; but not whether it is a true or a false one. The judges are not competent to this inquiry ; it is not their province, but the province of a jury, to determine it ; *ad questionem juris, non facti, judices respondent,*

He adds, at p. 107:

> . . . the writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the court upon a matter of law where the facts are disclosed and admitted; it puts the case exactly in the same situation as if an action of false imprisonment had been brought, and the defendant had set forth a series of facts to justify the imprisonment, and the plaintiff had demurred to the plea.

A Later he says, at p. 112:

> I find no authority which warrants a difference between returns, when filed to writs of *habeas corpus* in cases of private custody, and of public custody, where the facts justifying the imprisonment have been set forth; that is where there has been a full, complete, sufficient return.

B He then goes through the various cases which justified his view and showed that a return good on its face and with no affidavit in support of it could not be disputed on the application for the writ. The return, he said, at p. 127, was 'sacred," and could not be touched but by consent.

C There were, however, applications for the writ in many cases where the custody was of a private nature, *e.g.*, cases relating to custody of infants, confinements of alleged lunatics, committals for contempt of privilege by either House of Parliament, claims by slaves to be freed, and even applications by husbands seeking to recover possession of their wives, D and special attention had been drawn to cases of imprisonment for military service (see WILMOT, C.J., at p. 81) and to the powers exercised too often by incompetent commissioners in bankruptcy to commit bankrupts and others to gaol for long periods. As the result of long agitation for reform, the Habeas Corpus Act, 1816, became law. It is curiously E framed (for a full statement of the Act, see the judgment of LORD HALSBURY in *Cox* v. *Hakes* (5), at p. 515). So far as the question of the power of the court to examine the return to the *habeas corpus* is concerned, it is dealt with in sects. 3 and 4 of the Act, but the sections are confined to cases otherwise than for some criminal, or supposed criminal, matter, F and except persons imprisoned for debt or by process in any civil suit. Thus, in these excepted matters, the return (in general) was, and is still, conclusive. In other cases, which were plainly under *habeas corpus* at common law, the judge was given power to examine into the " truth of the facts " set forth in the return, " although the return be sufficient at G common law." However, the judge was not directed in all cases to make this examination, and he has still, and always has been treated as having, to exercise a discretion in the matter (see *Hobhouse's Case* (6) for the proposition that the writ at common law was " grantable of course "). I will mention two of the decisions which show that this view is correct.

H In *Carus Wilson's Case* (2), the court (DENMAN, C.J., and PATTESON, WILLIAMS and WIGHTMAN, JJ.) decided that, on a return to a writ of *habeas corpus* by the Viscount and Gaoler of Jersey, who were detaining the body of the applicant by virtue of a sentence of the Royal Court of Jersey for a contempt, they were not entitled to go into the question whether the law of Jersey authorised the sentence or the detention. They declined to receive affidavits for the purpose of seeing whether the detention was lawful and (I emphasise these words) whether the proceeding was under the Habeas Corpus Act, 1679, or the Habeas Corpus Act, 1816, or at common law. PATTESON, J., observed that, if the proceeding was under the Habeas Corpus Act, 1816, the question would be [p. 1010] :

> What are the affidavits which we can receive ? This is a return made by officers (not by a court ; a court never makes a return) that the prisoner is in custody by sentence of the court.

That, he said, could not be questioned, and so the court decided.

A like question was considered by the King's Bench in the well-known *Middlesex Sheriff's Case* (7). There the Serjeant at Arms of the House of Commons had detained the prisoners on a warrant signed by the Speaker of the House stating that the prisoners had been guilty of a contempt and breach of the privileges of the House. The judges did not decide that the case was within the provisions of the Habeas Corpus Act, 1816, though for my part I cannot see why any doubt was entertained in that matter, nor did they base their decision on the ground that the House of Commons was a court. What they did decide was that return was a sufficient answer and put an end to the case, and that the court could not go into the question of contempt on affidavit, nor discuss the motives which might be alleged for the order. LORD DENMAN, C.J., at p. 291, makes a somewhat ambiguous statement that the Habeas Corpus Act, 1816, s. 3, " was not applicable." I think that he must have meant that, in the case of the return setting up the warrant of the Speaker, it would not be right to examine further into the validity of the warrant. LITTLEDALE, J., put this very clearly. He said, at p. 293 :

> If the warrant declares the grounds of adjudication, this court, in many cases, will examine into their validity ; but, if it does not, we cannot go into such an inquiry. Here we must suppose that the House adjudicated with sufficient reason ; and they were the proper judges.

See also *Hobhouse's Case* (6) and *Watson's Case* (8), at pp. 782, 785, 786.

In the present case, I think that the order itself is a sufficient answer, and we must presume that the Secretary of State, acting under a regulation having the force of law, had what he considered reasonable cause for his belief. I agree with what GODDARD, L.J., in his careful judgment said on this point ([1941] 3 All E.R., at p. 121) :

> I am of opinion that, where, on the return, an order or warrant which is valid on its face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit. It must depend on the ground on which the return is challenged, but, where all that the prisoner says in effect is, " I do not know why I am interned, and I deny that I have done anything wrong," that does not require an answer, because it in no way shows that the Secretary of State had not reasonable cause to believe, or did not believe, otherwise.

These conclusions were, of course, intended to apply to an order made, not by a court of law, but by an officer entrusted by Parliament with the making of such an order. I will add that, in the present case, the circumstance that the Secretary of State is entitled to withhold from the court the grounds, or some of the grounds, on which he formed his belief constitutes a further reason why, if there had been no affidavit by the Secretary of State, the Divisional Court would have acted wisely in refusing the application for the writ. It would be useless to attempt to examine the truth of the fact alleged in the order in a case where the fact relates to the personal belief of the Secretary of State formed partly at least on grounds which he is not bound to disclose. In the present case, therefore, there was, in my judgment, no necessity for an affidavit by the Secretary of State once the order itself was proved or admitted. However, I am not attempting to lay down a general rule.

The other point argued before your Lordships can, I think, be dealt with shortly. I agree with all the judges who have considered this case that the appellant has not shown that he was prejudiced by the error in the document sent to him by the advisory committee. I also agree with their view that a mistake in that document could not, in any event, invalidate the original detention, or render its continuance invalid. For these reasons, I think that the appeal fails, and that it should be dismissed.

LORD ATKIN dealt with this case in the course of his opinion in the Liversidge case printed at p. 349, *ante*.

LORD MACMILLAN: My Lords, on May 22, 1940, Sir John Anderson, then Secretary of State for Home Affairs, made the following order relating to the appellant:

> Defence (General) Regulations, 1939. Detention Order.
>
> Whereas I have reasonable cause to believe Ben Greene of The Hall Cottage, Berkhampsted, to be a person of hostile associations and that by reason thereof it is necessary to exercise control over him: Now, therefore, I in pursuance of the power conferred on me by the Defence (General) Regulations, 1939, reg. 18B, make the following order:
>
> I direct that the above-mentioned Ben Greene be detained.
>
> John Anderson,
> One of His Majesty's Principal Secretaries of State.
>
> May 22, 1940.

Under this order, the appellant was, and is, detained in Brixton Prison.

On Mar. 26, 1941, the appellant made an *ex parte* application to the Divisional Court for the issue of a writ of *habeas corpus*. His application was supported by an affirmation of facts and circumstances.

Consideration of the application was adjourned in order that notice might be given to the Secretary of State and to the governor of Brixton Prison. At the adjourned hearing, the Attorney-General appeared on behalf of the Secretary of State, admitted that the order under which the appellant was detained was made by the Secretary of State, and submitted an affidavit by the Secretary of State in which he stated that he had received confidential reports which constituted a reasonable cause for the belief expressed in his order. The Divisional Court refused the applicant's application, and the Court of Appeal affirmed the decision of the Divisional Court, but gave leave to appeal to this House.

Reg. 18B (1), made by His Majesty in Council under the Emergency Powers (Defence) Act, 1939, provides that, "If the Secretary of State has reasonable cause to believe" any person, *inter alia*, to be of hostile associations, so that, by reason thereof, it is necessary to exercise control over him, he may make an order against that person directing that he be detained. The main contention of the appellant before your Lordships, as before the courts below, was that the production of the Secretary of State's order of May 22, 1940, was not a sufficient justification of his detention. He argued that, while it was no doubt for the Secretary of State in the first instance to make up his mind as to whether he had reasonable cause to believe the relevant matters, he was not the final judge, and had to satisfy the court that he had in fact such cause as would induce belief in an ordinary reasonable man. To enable the court to judge of this, he must produce the information on which he formed the belief which he professed to entertain.

My Lords, in *Liversidge's* case (1), the same broad issue was the subject of consideration, and this House decided that the interpretation which the appellant sought to place upon the language of the regulation was in law untenable. I do not propose to repeat the reasons which I advanced in support of the view which the House adopted. They are equally applicable to the present case. The Secretary of State is not bound to disclose or to justify to any court the grounds on which he conceived himself to have reasonable cause to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him. The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which are in no way impugned, constitutes a complete and peremptory answer to the appellant's application. It justifies in law his detention, in the absence of any relevant challenge of its validity, and there is no such challenge. It necessarily follows that the Secretary of State had no need to submit an affidavit. I would only remark that, if, contrary to my view, the law required him to justify the reasonableness of his cause of belief, an affidavit such as he submitted in this case would not enable the court to pass judgment on the matter, for it does not set out the information which he possessed when forming his belief. It is only an assurance of the thoroughness of the investigation which he made, and not a disclosure of what that investigation yielded.

A second point was taken by the appellant. It appears that he availed himself of his right under the regulation to make objections against the detention order to an advisory committee, and your Lordships have before you a document emanating from the advisory committee which considered the appellant's objections. It is entitled "Reasons for order under Defence Regulation 18B in the case of Benjamin Greene," and it opens by stating that the order:

> . . . was made against you, Benjamin Greene, for the following reason: The Secretary of State has reasonable cause to believe that you have been recently concerned in acts prejudicial to the public safety and the defence of the realm and

> in the preparation and instigation of such acts and that it is necessary to exercise control over you.

The document then proceeds to set out particulars in six paragraphs.

On a comparison of the reason for the appellant's detention as stated by the advisory committee with that which is set out in the Secretary of State's detention order, a most unfortunate discrepancy is at once apparent. The Secretary of State believed that the appellant was a person of hostile associations, and that, by reason of this, it was necessary to exercise control over him. The advisory committee, on the other hand, investigated the appellant's case on the footing that it was something else, and something much graver, that the Secretary of State believed against him. No explanation of this very serious error is forthcoming. Nothing could be more unfortunate than that, in a matter in which scrupulous accuracy is imperative, the impression should be created that the safeguards prescribed for the protection of detained persons are carelessly observed and administered. The Court of Appeal has found that the appellant has not suffered any material prejudice by reason of the error, but this does not condone it, nor does the Court of Appeal in any way condone it. I have to point out, however, that what is before your Lordships is an application for a writ of *habeas corpus*, and that the appellant's complaint is that he had been, and is being, detained without any legal warrant. The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention. Consequently, the mistake affords no ground for invalidating the detention order, and does not help the appellant in his present application. The error is fortunately not irremediable, and your Lordships have the consolation of an assurance from the Attorney-General that an opportunity will be given to the appellant, if he so desires, to lay his objections afresh before another advisory committee, which will have before it the true reason for his detention. I concur in the motion that the appeal be dismissed.

LORD WRIGHT: My Lords, the appellant applied for a writ of *habeas corpus* to obtain release from detention to which he was subjected under an order made in pursuance of the Defence (General) Regulations, 1939, reg. 18B. It was not questioned that the regulation was validly made under the Emergency Powers (Defence) Act, 1939. The appellant is at present detained in His Majesty's Prison, Brixton, under the order, which was made by Sir John Anderson, the then Home Secretary, and was dated May 22, 1940. It was in the following terms:

> Whereas I have reasonable cause to believe Ben Greene of Hall Cottage, Berkhamsted, to be a person of hostile associations, and that by reason thereof it is necessary to exercise control over him: Now, therefore, I in pursuance of the power conferred on me by the Defence (General) Regulations, 1939, reg. 18B, hereby

make the following order, I direct that the above-mentioned Ben Greene be detained.

John Anderson,
One of His Majesty's Principal Secretaries of State.

When Sir John Anderson retired from the office of Secretary of State, the respondent succeeded to the office, and, in exercise of his duties as A Secretary of State for Home Affairs, has continued the detention of the appellant. On Mar. 21, 1941, the appellant, being still detained, in support of an application for a writ of *habeas corpus* made an affirmation in which he gave an account of his activities and opinions in order to show that neither Sir John Anderson nor the respondent had reasonable B cause, or any cause, to believe that he had been concerned in acts prejudicial to the public safety and the defence of the realm, and denied that he was a person of hostile associations. He applied that a writ of *habeas corpus* should be issued directed to Sir John Anderson and the respondent. The former, by affidavit sworn on Apr. 22, 1941, deposed C that before he made the order he had received reports and information from persons in responsible positions who were experienced in investigating matters of the kind, and whose duty it was to make such investigations and report the same to him confidentially, and that he carefully studied the reports and considered the information and came to the D conclusion that there was clear cause to believe, and he did in fact believe, that the appellant was a person of hostile associations, and that by reason thereof it was necessary to exercise control over him. The respondent on the same day swore an affidavit deposing that he had satisfied himself that the appellant was a person of hostile associations, E and that by reason thereof it was necessary to exercise control over him.

The appellant then, in an affirmation made on Apr. 24, 1941, demanded that the court should insist on its right to have before it the evidence on which Sir John Anderson acted. He gave further details of his career and his opinions and produced testimonials as to his character F directed to show that there was no reasonable cause for the belief of the Home Secretary, and, in substance, that the order was bad. He also claimed to be released on a subsidiary ground, which was that, when he was to appear before the advisory committee, he was given a document purporting to contain certain reasons for the order, but that document G incorrectly recited the order, because it stated that the Home Secretary had reasonable cause to believe that he had been recently concerned in acts prejudicial to the public safety and the defence of the realm and in the preparation and instigation of such acts, and that it was necessary to exercise control over him. The particulars set out in the document H were six in number, and several of them were relevant to a case of hostile associations. The courts below, while deploring and condemning the error, decided that it was impossible to hold, in the circumstances, that it had prejudiced the appellant or invalidated the actual order which was made, though the courts were of opinion that the appellant should be given an opportunity of a further hearing before an advisory committee differently constituted from that before which he had appeared. The Attorney-General has not raised any objection to this course. I feel very strongly that, in a question like this, affecting the liberty of the subject, the greatest care should be taken and the greatest correctness of procedure observed. Laxity is most reprehensible, whoever may have been responsible. The appellant has not so far availed himself of the opportunity afforded him, which is still available to him. I see no reason to differ from the opinion of the court below that this irregularity does not vitiate the order made and continued. On the main point, both the Divisional Court and the Court of Appeal have decided against the appellant. I agree with that decision, for reasons which I shall briefly state.

The writ of *habeas corpus* is an ancient common law writ, which, from about the end of the sixteenth century or the earlier years of the seventeenth century, came to be used as the normal procedure for protecting the liberty of the subject against unlawful arrests and detainments, in particular those by order of the executive. The history of this great remedial writ is succinctly but lucidly and accurately described in Holdsworth's History of English Law, Vol. IX, pp. 112-124. I am concerned here merely with limited aspects.

The common law adapted the old writ *habeas corpus ad suscipiendum et recipiendum* to the purpose of securing the subject's immunity from arbitrary arrest and imprisonment save by due process at law. In its earlier use, the writ had been from old days one of the procedural or mesne process writs. The right to freedom which the writ was directed to vindicate was said to be secured by the famous words of Magna Carta, a translation of which was thus embodied in the Petition of Right, 1627, s. 3:

> And where alsoe by the statute called the Great Charter of the liberties of England, it is declared and enacted, That no freeman may be taken or imprisoned or be disseised of his freehold or liberties . . . or be . . . in any manner destroyed, but by the lawfull judgment of his peeres or by the law of the land.

This provision was reiterated in the Petition of Right, 1627, because of the refusal of the Court of King's Bench to grant the writ in *Darnel's Case* (9), where the return that the arrest was *per speciale mandatum Domini Regis* was held to be a good return, which meant that a lawful cause of imprisonment was shown. We are told, no doubt with good reason, that the judges were influenced by the opinion that some degree of prerogative power was necessary to enable the Crown to deal with emergencies. The decision and arguments are analysed in Holdsworth's History of English Law, Vol. VI, p. 34, *et seq.* However, the Petition of Right, 1627, declared such a cause of imprisonment to be unlawful. In the same way, it was enacted in the Habeas Corpus Act, 1640, abolishing the Star Chamber, that any person committed or imprisoned by order of the Star Chamber or similar bodies should have his *habeas corpus.* It is clear that the writ of *habeas corpus* deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right. The writ is described as being a writ of right, not a writ of course. The applicant must show a *prima facie* case that he is unlawfully detained. He cannot get it as he would get an original writ for A initiating an action, but, if he shows a *prima facie* case, he is entitled to it as of right. The first question, therefore, in any *habeas corpus* proceeding is whether a *prima facie* case is shown by the applicant that his freedom is unlawfully interfered with, and the next step is to determine if the return is good and sufficient. A person unlawfully detained is B entitled as of course to obtain a writ of trespass. An action of trespass or false imprisonment, however, does not by itself secure the immediate or speedy release of the plaintiff, if he is still detained when he commences his action. As LITTLEDALE, J., said in *Watson's Case* (8), at p. 795:

> A party imprisoned has two modes of proceeding, either by action for false C imprisonment or by application for a *habeas corpus*. In an action for false imprisonment the defendant must prove his justification (if any); and (except where allowed by express provision to give it under the general issue) he must also set forth the justification specially on the record. In the return to an *habeas corpus* no such minuteness of detail is necessary; nor in any instance that I can find has it been considered necessary to support the return by affidavit.

The incalculable value of *habeas corpus* is that it enables the immediate D determination of the right to the applicant's freedom. On this aspect, I may refer to the discussion by LORD HALSBURY in *Cox* v. *Hakes* (5), at pp. 514, 515:

> In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, E and the twofold quality of such determination that, if favourable to liberty it is without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit but was a summary application by the person detained. No other party to that proceeding was necessarily before or represented before the judge except the person detaining, and that person only because he had F the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as LORD COKE described it, *festinum remedium*.

When, in the Habeas Corpus Act, 1816, the court was given power, if it saw fit in the cases to which the Act applied, to inquire into the truth of the facts set out in the return, it was to be in a summary way, G by affidavit or affirmation (sect. 3). The efforts of the courts, aided by the legislature by means of the Acts of 1679 and 1816, have invariably been directed to preventing evasion and delay in the proceedings, such as the *alias* or *pluries* writ or the cruder course of removing the person detained out of the jurisdiction, and to making them effective in the H shortest possible time. I have adverted to these features of the Habeas Corpus Act, 1816, because I shall later have to deal with some questions of the procedure.

I have emphasised the use of the writ to secure freedom from arbitrary or unlawful arrest by the government, but, besides these public occasions, it was employed in connection with private arrests and detainments, so that the writ applies to indefinitely wider and more various exigencies, and, indeed, to any case whatever in which the liberty of the subject is unlawfully interfered with. Without any attempt to make a catalogue, I may mention the case of persons impressed into the Navy in days when certain legal powers of impressment existed and that of persons arrested or committed by decree of a court said to be without the necessary jurisdiction. Many other instances might be given. The procedure is not limited to the acts of public or judicial officers, or acts of administration. It extends to purely personal matters. Thus, for instance, in *R.* v. *Jackson* (10), the writ was issued against a husband restraining his wife's personal freedom, on the ground that the husband had no legal right to shut up his wife in order to enforce restitution of conjugal rights. The procedure is frequently used to decide who is entitled to the custody of an infant or person under disability, as in *R.* v. *Barnardo, Jones's Case* (11). It is said that in such cases it is not strictly a question "of liberty, but of nurture, control and education," in the words of LORD ESHER, at p. 204, but it does involve determining who is entitled in law to the care and control of the child. In this House, where the case was entitled *Barnardo* v. *McHugh* (11), it was held that an appeal was competent, as the infant must be under someone's control, and a further inquiry into the facts was ordered. The inestimable value of the proceeding is that it is the most efficient mode ever devised by any system of law to end unlawful detainments and to secure a speedy release where the circumstances and the law so require.

The main question, then, in this appeal is whether there is a legal cause of detainment. What is relied on by the respondent is the order under reg. 18B, or, more accurately, the order of Sir John Anderson when Home Secretary, coupled with the adoption of it by the respondent when he in turn became Home Secretary. The contention on behalf of the appellant is that the order is not sufficient on its face to constitute a good return, because it can be effective only if the Home Secretary had reasonable cause to believe, and that the validity of the order depended on the court's being satisfied that in fact such grounds existed. The appellant, accordingly, in his affirmation, to which I have referred, challenged the respondent to state the evidence on which he proceeded. Until that was done and the reasonable cause established, the order, he contended, was inoperative, and the detention was without lawful authority. The respondent, on the other hand, contended that the order, together with its adoption by the appellant, was a good return, and that the detention was lawful. There was a further subsidiary, but not unimportant, point—namely, whether an affidavit is necessary in making the return. The Attorney-General has contended that it is not. In addition, a middle course has been discussed, which is that, while, on the one hand, the order is not a sufficient return, some statement, I suppose, on oath, of the evidence on which it is based and on which the respondent acted is necessary, so that, if the respondent is debarred by the exigencies of official secrecy from disclosing all his reasons, he must at least disclose sufficient to satisfy the court that he had reasonable cause to believe.

As the appeal has been argued without specific reference to form or technicalities, I can state in few words my opinion to be that the detention is lawful and the answer of the respondent constitutes a good and sufficient return. The lawfulness of the detention depends on what is the true construction of reg. 18B. I explained my opinion on that matter in *Liversidge's* case (1), which your Lordships have just decided. I need not here repeat at length the conclusion which I reached or the reasons which I gave in that appeal. It is enough here to say that the regulation gives the Secretary of State a plenary discretion to make a detention order against the appellant if he has in his own mind, and according to his own judgment, reasonable cause to believe that the appellant is a person of hostile associations, and that, by reason thereof, it is necessary to exercise control over him. In making the order, Sir John Anderson exercised that plenary discretion, and the respondent, when he succeeded him as Home Secretary, exercised the same plenary discretion when he adopted the order and continued the detention. The order relied upon by the respondent is *ex facie* a good and valid order. Its authenticity is not disputed. It is not said that the appellant is not the person intended. The order itself justified the detention. No affidavit verifying or explaining it is necessary, any more than it was in *Middlesex Sheriff's Case* (7). The warrant there was one of commitment by the House of Commons. DENMAN, C.J., said, at pp. 291, 292:

> On a motion for a *habeas corpus* there must be an affidavit for the person applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think that the production of a good warrant is a sufficient answer.

I think that this applies to the present case. The order made by the Home Secretary in the terms of reg. 18B speaks for itself. It is admissible as a public executive document to show a good cause for the detention, and needs no extrinsic justification. It is good on its face unless and until it is falsified. There is no doubt a complication, because the original order was made by Sir John Anderson, and the respondent did not issue a fresh order, but merely adopted the order which he found in operation. He deposes in his affidavit to this fact, but I do not think that an affidavit from him was necessary. His statement would have been enough, at least in the first instance and until it appeared to the court that sufficient reason was shown to question it and exercise its power to inquire into the merits under the Habeas Corpus Act, 1816, s. 3. In *Watson's Case* (8), there was no warrant to the actual gaoler. The return consisted of a long statement of facts, not put on affidavit or affirmation. The court held that no affidavit was necessary. There must be many cases in which the return is not a warrant or official order, but a narrative of facts. Such a case was *R.* v. *Jackson* (10), where it appears that in the first instance the return was in the form of a statement of the facts, though affidavits were filed on the subsequent inquiry. Until there emerges a dispute of fact into which the court feels it should inquire, I think the defendant's statement is enough, though no doubt, if the court is proceeding to inquire into the merits, it may order affidavits. The guiding principle of *habeas corpus* is, as I have explained, that it is *festinum remedium.* Hence there is a presumption against unnecessary affidavits. As was said in DICEY'S LAW OF THE CONSTITUTION, 8th Edn., p. 217 :

> There is no difficulty and there is often very little gain in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end and have therefore done for the liberty of Englishmen more than could be achieved by any declaration of rights.

Simple as the proceeding is, it has been so effective as to be universally applauded and adopted by all common law jurisdictions. If the remedy was kept so free from technicality in days which generally favoured technicality, it must *a fortiori* be kept as simple and expeditious as possible in these more practical times. The new rules under R.S.C., Ord. 59, do not affect this matter.

In the present case, there are no facts to inquire into. The only possible inquiry of fact, once the authenticity of the order and its application to the appellant are conceded or established, is as to whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause. It is true that, in the words of LORD BOWEN, the state of a man's mind is as much a fact as the state of his digestion. If the Home Secretary were to misrepresent the state of his mind, that would be fraud, but that is out of the question here, and need not be considered.

It would be superfluous to point out that the basis of the conclusion here adopted is that the order and statement are good on their face—that is, that they show a competent exercise of a lawful authority. If an order or warrant is bad on its face, it can give no legal justification for the imprisonment. Thus, in *Bushell's Case* (12) a commitment which showed that it was to punish persons for giving a verdict of which the court did not approve, and which was said to be *contra plenam et manifestam evidentiam et contra directionam curiae in materia legis*, was held to be bad as showing a cause which was not lawful. It was pithily observed that the writ of *habeas corpus* was then (1670) the most usual remedy by which a man might be restored again to his liberty, if he had been against law deprived of it. Similarly, in *R.* v. *Browne, Corbet, etc.* (13), a warrant was held to be bad on its face because the warrant was under the King's own hand, without seal or the hand of any secretary or officer of state or justice. In the same way, where the return consists of a narrative of facts, it will be bad if the facts stated do not show a legal cause for the detention, as in *R.* v. *Jackson* (10).

It may be objected that the discretionary powers thus vested in the Secretary of State are just those which were upheld by the Court of King's Bench in *Darnel's Case* (9) and condemned in the Petition of Right, but the answer is that they are here lawful under this regulation, because they are conferred, not in general terms, but under definite limitations, by the supreme authority of Parliament, and are thus the law of the land. This distinguishes the effect of reg. 18B, and, similarly, its prototype, reg. 14B, made under the Defence of the Realm Consolidation Act, 1914, which was discussed by this House in *R.* v. *Halliday, Ex p. Zadig* (14), from the legal position when *habeas corpus* is suspended by Act of Parliament, which is the only mode by which it can be suspended. In the latter case, the detention is still unlawful apart from further enactment, and an action of false imprisonment or criminal proceedings are not barred, unless the suspension of *habeas corpus* is accompanied by a statutory indemnity. Otherwise, in such cases the remedy alone is suspended to the extent prescribed by the Act. A B

Reference has been made to *R.* v. *Home Secretary, Ex p. Lees* (15). There the Home Secretary had made an order under reg. 18B. The applicant in his affidavit referred to the order, and also exhibited the reasons furnished to him for the purpose of a hearing before the advisory committee there in accordance with para. (5) of the regulation. The Home Secretary made affidavits in reply stating that he had received and studied reports and information, and, on consideration, had come to the conclusion that in the national interest it was necessary to make the order. The Court of Appeal rejected the idea that the court could be made to act as a court of appeal from the discretion of the Secretary of State, or to inquire into the cause of his belief, or to consider if he had a reasonable cause for his belief. I agree with this view, but I wish to add that I do not think that it was necessary to have had affidavits from the Home Secretary at all in that case. The case was relied on before your Lordships as showing that it was. I do not so understand it, looking at it as a whole, but, if that appears from anything in the case, I do not agree, for the reasons which I have explained. In my judgment, the appeal should be dismissed. C D E F

LORD ROMER: My Lords, in *Liversidge* v. *Anderson and Morrison* (1), your Lordships have just decided that, according to the true construction of reg. 18B (1), made under the Emergency Powers (Defence) Acts, 1939 and 1940, the words "If the Secretary of State has reasonable cause to believe" do not mean, "If there is in fact reasonable cause for his belief," but, "If he is of opinion that there is such cause." In the present case, the facts of which I need not repeat, it is plain that Sir John Anderson was of opinion that there was reasonable cause for his belief, and that he did honestly believe, that the appellant was a person of hostile associations, and that, by reason thereof, it was necessary to exercise control over him. It necessarily follows that, so far as the appellant relies upon the absence of proof that there was in fact reasonable cause for such belief, the appeal must fail. G H

It only remains to deal with the mistake in the document emanating

from the advisory committee in purported pursuance of the duty cast upon the chairman of the committee by para. (5) of the regulation. The mistake, of which no explanation has been given to your Lordships, was most regrettable, but it cannot affect the validity of the order which
A had been made by the Home Secretary nearly two months before. Had the appellant been prejudiced by the mistake, the court might nevertheless have afforded him some relief, but the matter was carefully considered both by the Divisional Court and the Court of Appeal. They came to the conclusion that the appellant had not been in any way
B prejudiced by the mistake, and I am satisfied that their conclusion was right. For these reasons, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Oswald Hickson, Collier & Co.* (for the appellant); *Treasury*
C *Solicitor* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WHITSTABLE URBAN DISTRICT COUNCIL *v.* TRITTON.

[COURT OF APPEAL (MacKinnon, Clauson and Luxmoore, L.JJ.), **October**
E **17, 1941.**]

Emergency Legislation—Action for possession—Tenancy determined by notice to quit—Whether leave to proceed necessary—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*) (iii).

The plaintiffs served on the defendant notice to quit a house of which he was tenant, and, on the defendant's failure to comply with the notice,
F obtained from the county court an order for possession. On their applying for a writ of possession, the county court judge held that they must first obtain leave to proceed by virtue of the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (iii):—

HELD: the plaintiffs were entitled to apply for a writ of possession without the leave of the court under the Courts (Emergency Powers) Act, 1939.

G

[**EDITORIAL NOTE.** It would appear that there has been some doubt among county court judges as to how far leave to proceed is necessary in cases of this kind. It now seems settled that, where the term has expired, or has been properly determined by notice to quit, no leave to proceed is necessary. It is, of course, otherwise where an action for possession is brought solely on the ground that rent is in arrears.
H In the latter case, leave to proceed is required under the Courts (Emergency Powers) Act, 1939, s. 1 (3). It will be appreciated that in many cases the plaintiff's remedy will be barred by the Rent and Mortgage Interest Restriction Acts.

FOR THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946.]

Case referred to:

(1) *S. & A. Services, Ltd.* v. *Dickson*, [1940] 2 K.B. 219; [1940] 3 All E.R. 98; Digest Supp.; 109 L.J.K.B. 665; 163 L.T. 74.

APPEAL by the plaintiffs from a decision of His Honour JUDGE CLEMENTS at the Ashford County Court, dated Aug. 26, 1941. The respondent was the tenant of the appellant council, renting a house on the council's housing estate, and, in accordance with the terms of the tenancy, the appellants served upon him a notice to quit. The respondent A failed to comply with the notice, and the appellants brought an action for possession and for arrears of rent and mesne profits. On obtaining judgment, the appellants applied to the county court judge for a writ of possession. The Rent and Mortgage Interest Restrictions Acts were not applicable in this case. The county court judge held, however, B that the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (iii), required that the leave of the court should be obtained before the appellants could proceed to enforce the order for possession.

L. S. Fletcher for the appellants.

The respondent did not appear and was not represented. C

CLAUSON, L.J. [his Lordship stated the facts]: The Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*), provides as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (*a*) to proceed to exercise any remedy which is available to him by way of (i) the levying of distress; (ii) the taking of possession D of any property or the appointment of a receiver of any property; (iii) re-entry upon any land . . .

Every one of the provisions of this subsection, however, has to do with what is described as self help by the plaintiff. If there is any doubt, it is resolved by the decision of this court in *S & A. Services, Ltd.* v. E *Dickson* (1). That decision lays down in the clearest terms that the section refers to matters of self-help, and has nothing to do with the obtaining from, or issue by, the court of such directions to the court's officer as may be necessary to enforce the order already made by the court. I can see no escape from the proposition that the decision of the court in *S. & A. Services, Ltd.* v. *Dickson* (1) completely covers the F present case. Accordingly the Courts (Emergency Powers) Act, 1939, places no obstacle in the way of an application to the court to issue, or the action of the court in issuing, a writ of possession. The appeal must be allowed. G

MACKINNON and LUXMOORE, L.JJ., agreed.

Appeal allowed.

Solicitors: *G. & G. Keith*, agents for *Gardner & Allard*, Whitstable (for the appellants). H

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RHODES *v.* SECRETARY OF STATE FOR WAR.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Charles and Humphreys, JJ.), **October 23, 1941.**]

A *Emergency Legislation—Compensation—Property requisitioned by military authorities—Compensation fixed by negotiation—Claimant's solicitors' costs of negotiation—Inclusion of such costs in compensation—Compensation (Defence) Act*, 1939 (*c.* 75), *ss.* 2 (1) (*d*), 7, 9.

B The appellant's house was requisitioned by the Secretary of State for War. On receiving the requisition notice, the appellant instructed his solicitors to act for him in the matter. As a result of the negotiations, the rate of compensation was fixed by agreement, without reference to any tribunal. The appellant claimed that he was entitled to his solicitors' costs in connection with conducting the negotiations, on the ground that those costs were expenses incurred in complying with the requisition order within the meaning of the Compensation (Defence) Act, 1939, s. 2 (1) (*d*):—

C HELD: the expenses of negotiating the compensation to be paid in respect of the requisitioning of a claimant's property on behalf of His Majesty are not as of right recoverable as part of the compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (*d*).

D [**EDITORIAL NOTE.** This is quite a short point, but one of very great importance in matters arising under the Compensation (Defence) Act, 1939. In negotiating a friendly settlement of a claim to compensation without reference to the tribunal, legal costs are generally incurred and the sole question arising is whether these costs can be recovered under the Compensation (Defence) Act, 1939, s. 2 (1) (*d*). This is purely a question of the construction of the Act and it is decided that such costs are not recoverable under the Act.

FOR THE COMPENSATION (DEFENCE) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1013.]

E SPECIAL CASE STATED for the opinion of the King's Bench Division of the High Court under the provisions of the Compensation (Defence) Act, 1939, s. 7.

F A dwellinghouse, of which the claimant was the absolute owner, was requisitioned by the military authorities who took possession thereof on Oct. 2, 1940. The owner claimed compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (*a*), of an annual rent of £45 per annum and, under sect. 2 (1) (*d*), of solicitors' costs incurred in negotiating the amount of compensation. The amount of the compensation under sect. 2 (1) (*a*) was agreed between the parties, but a sum of £5 5*s.* claimed under sect. 2 (1) (*d*) was disputed. The special case stated as follows:

G 3. The costs referred to were incurred by the claimant in respect of negotiations as to the compensation payable conducted by the solicitors on behalf of the claimant before the reference of the dispute to the tribunal, which costs would not accordingly be included in the costs of the reference recoverable, if so ordered, by the claimant.

H 4. The claim for the costs referred to was based at the hearing on sect. 2 (1) (*d*) [of the Compensation (Defence) Act, 1939], it being contended that they were expenses reasonably incurred for the purpose of compliance with directions given on behalf of His Majesty in connection with the taking possession of the land within the meaning of that clause.

5. It was not contended on behalf of the authority that it was unreasonable for the claimant to employ solicitors in the negotiations. The authority in fact conducted those negotiations with the solicitors and were willing as appears by para. 5 of the answer to make a payment in respect of these charges. It was however contended that the authority was under no liability in that respect under the statute and the offer of payment was *ex gratia*.

6. In support of the above contention of the authority it was argued that sect. 2 (1) (*d*) of the statute corresponded with the Defence (General) Regulations, 1939, reg. 51 (1), made under the Emergency Powers (Defence) Act, 1939, where the same language

is used, and that the expense of employing solicitors for the purpose of negotiating as hereinbefore stated was not incurred for the purpose of compliance with any directions given on behalf of His Majesty in connection wiht the taking possession of the claimant's land within the meaning of the statute.

7. We understand that the question, though involving in the present instance a very small amount, is one of great public importance in view of the vast number of cases of this kind which have arisen and will arise.

The Compensation (Defence) Act, 1939, s. 2 (1) (*d*), provides as follows :

> The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums . . . (*d*) a sum equal to the amount of any expenses reasonably incurred, otherwise than on behalf of His Majesty, for the purpose of compliance with any directions given on behalf of His Majesty in connection with the taking possession of the land . . .

Valentine Holmes for the appellant.

Hon. H. L. Parker for the respondent.

VISCOUNT CALDECOTE, L.C.J.: Compensation in respect of taking possession of land is dealt with by sect. 2 of the Act, and, as appears from sect. 7, compensation may be settled by agreement, or, in default of agreement, the dispute as to compensation may be referred to, and determined by, the appropriate tribunal. If the determination of the claim is not agreed and is referred to the tribunal, the powers of the tribunal are set out in sect. 9 of the Act. By sect. 9 (1) (*c*), the tribunal has the power :

> . . . to award . . . such sums by way of costs as the tribunal in its discretion thinks just.

That power to award costs is different from the power to award compensation under sect. 2.

The only question which we have to consider is whether expenses of the character mentioned in para. 3 of the special case, which I have read, are recoverable as expenses reasonably incurred for the purpose of compliance with any directions given on behalf of His Majesty. We have not been referred to any express directions by the Secretary of State. We have been shown a copy of the notice of requisition, but it has been agreed by counsel for the respondent that this case must be argued upon the assumption that implied directions were given in that notice. Nothing could be more reasonable than that persons who are required to hand over their property for public purposes, for the safety of the realm, as in this case, should seek advice as to the measure of compensation which is provided by the Act of Parliament. We are informed that the experience of government departments has been that parties in the vast majority of cases have been ready to agree the amount of compensation without the necessity of referring the matter to the tribunal. That may be so, and, of course, I accept it, but it throws no light upon the rights of the claimant in this case.

We have also been told that, although the Secretary of State for War stands upon the strict position that he is not bound to pay anything in respect of such expenses as are in question here—namely, expenses for the purpose of negotiating the compensation payable—in practice, *ex gratia*, he has paid such expenses. As to that, the only observation which I desire to make, without expressing any opinion at all on the question of the power of the Treasury to order payments *ex gratia* to a claimant, is this. This court and the tribunal have to be guided, and are governed absolutely, by the language of the Act, and it is desirable that parties should expect their compensation to be measured by the Act, and not by something which is dealt with as a matter of discretion by the Treasury. If the measure of compensation provided by the Act is not the proper one, there is a regular and a proper form of dealing with such a position. It may be that it would be thought more desirable that compensation should be awarded in accordance with the provisions of the Act, and not in accordance with some scheme or some measure of compensation which has been declared or fixed by a government department, such as the Treasury or the Secretary of State for War.

Having said that, I come to the only question which, as I have said, is for us, and that is whether the expenses of the negotiations concerning the compensation payable conducted by the solicitors on behalf of the claimant are expenses for the purpose of complying with any directions given on behalf of His Majesty in connection with the taking possession of the land. In the course of the argument, numerous imaginary cases have been considered. It is not disputed that the expenses of a solicitor in connection with making arrangements to comply with directions of the authority would be recoverable. Counsel for the respondent concedes that that would form part of the compensation which the tribunal has the power to assess, but it seems to me, after listening to the arguments, that there is a difference between expenses incurred in complying with the directions and expenses incurred in measuring the compensation for having complied with the directions. It is fair and right to say that it may be impossible to assess the compensation until the directions have been complied with, and, although, in a proper case, it would be fully in accordance with the Act to give the expense of employing a solicitor and surveyor in order to see what the directions meant and what was required to be done by the person concerned, it is a very different thing to say that, when all those directions have been complied with, the expense of employing a solicitor to ascertain the compensation to which the claimant is entitled for having complied with those directions, is recoverable, and I think that the expenses of measuring the compensation for having complied with the directions are not recoverable as part of the compensation under sect. 2. The question which the tribunal has submitted to us for the opinion of the court must, therefore, be answered by saying that the sum of £5 5*s*. claimed as expenses is not within the terms of sect. 2 (1) (*d*), and may not be awarded by the tribunal.

Charles, J.: I agree.

Humphreys, J.: I also agree, with regret.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Wade, Tetley, Hill & Co.*, Bradford (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re MIDDLESEX BRICK CO., LTD.

[CHANCERY DIVISION (Simonds, J.), **October 27, 1941.**]

Emergency Legislation—Winding-up order—Post-war contract—Jurisdiction to make order—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (5).

A judgment creditor in respect of a contract entered into after the commencement of the war petitioned for the winding up of a company, which applied for relief under the Courts (Emergency Powers) Act, 1939, s. 1 (5). The petitioner contended that, as the earlier subsections of sect. 1 dealt only with liabilities accruing in respect of contracts entered into before the outbreak of war, the effect of subsect. (5) was subject to a similar limitation :—

HELD : the language of subsect. (5), upon its proper construction, is not confined to liabilities accruing in respect of contracts entered into before the outbreak of war, and the court had jurisdiction to make an order.

[**EDITORIAL NOTE.** The jurisdiction under the Courts (Emergency Powers) Act, 1939, was in general limited to granting relief in respect of pre-war contracts, and subsequent legislation has extended this to post-war contracts. It is here pointed out that in one respect the original Act extended to post-war contracts. Sect. 1 (5) of the 1939 Act, which deals with bankruptcy and winding-up orders, is not, upon its proper construction, confined to pre-war contracts and the court has, under the 1939 Act, jurisdiction to stay such proceedings in the case of a post-war contract as well as in that of a pre-war contract.

FOR THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946 ; BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 206.]

Case referred to :

(1) *Re Romanos, Ltd.*, Unreported.

WINDING-UP PETITION presented by a judgment creditor. The facts are fully set out in the judgment.

Cecil Turner for the judgment creditor.

A. Wynn Parry, K.C., and *T.D.D.Divine* for the company.

SIMONDS, J. : This petition is presented by a judgment creditor for a sum of over £4,000 for goods supplied in and after Sept., 1940. Upon the petition being presented, the company proceeded to avail itself of the relief afforded by the Courts (Emergency Powers) Act, 1939, s. 1 (5). It had not thought fit to avail itself of the relief afforded by the Courts (Emergency Powers) Amendment Act, 1940, when the creditor sought to recover judgment.

The first question I have to determine is whether I have jurisdiction, if I think fit, to grant the relief under sect. 1 (5) of the 1939 Act, which is in these terms :

> Where a bankruptcy petition has been presented against any debtor, or a winding-up petition has been presented against any company on the ground that it is unable to pay its debts, and the debtor or company proves to the satisfaction of the court having jurisdiction in the bankruptcy or winding-up that his or its inability to pay his or its debts is due to circumstances directly or indirectly attributable to any war in which His Majesty is engaged, the court may at any time stay the proceedings under the petition for such time and subject to such conditions as the court thinks fit.

That subsection finds its place in a section in which the earlier subsections deal only with a liability accruing in respect of contracts which had been entered into before the commencement of the war, and it is argued by counsel for the petitioner that for that reason I must give effect to subsect. (5) as if it also dealt only with such liabilities. In my judgment, the language of the subsection is too plain for me to give effect to that contention. It is comprehensive. It refers to an inability to pay debts, without any reference to the time at which, or the manner in which, those debts were incurred. I must, therefore, come to the conclusion that the court has jurisdiction to order relief in any case in which it is proved that the company which it is sought to wind up is unable to pay its debts owing to "circumstances directly or indirectly attributable to any war in which His Majesty is engaged." I understand that that is the view to which Uthwatt, J., came in *Re Romanos, Ltd.* (1), and I come independently to the same conclusion.

[His Lordship then reviewed the circumstances of the present case and, in the exercise of his discretion, stood the petition over to next sittings, with liberty to apply.]

Solicitors : *E. F. Turner & Co.* (for the applicant) ; *Trower, Still & Keeling* (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

BUTLER *v.* ALCOCK AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Goddard and du Parcq, L.JJ.), **October 27, 28, 1941**.]

National Health Insurance—Approved society—Accident to member of approved society—Power of committee to institute proceedings on behalf of member—Whether society liable for failure to institute proceedings.

The appellant was a member of an approved society set up under the provisions of the National Health Insurance Act, 1924. He was involved in a road accident, which, he alleged, was due to the negligence of a servant of a local authority. The rules of the society gave them power to institute legal proceedings in cases where they might deem it advisable to do so, and the general secretary was to investigate all cases where the insured members were suffering from the results of accidents and obtain all information necessary for the information of the committee. In the case of the appellant the general secretary placed the matter before the committee, who, in the course of the preliminary steps towards bringing an action, discovered that the proposed defendants were a local authority, and could plead the protection of the Public Authorities Protection Act, 1893, s. 1. The committee thereupon decided to take no further steps in the matter, and the appellant then brought these proceedings against the society alleging negligence in failing to bring the proceedings in time :—

Held : the action failed *in limine* because the rules did not impose a duty on the society to institute legal proceedings, nor was it shown that they had expressly or impliedly contracted with the appellant to do so.

[**EDITORIAL NOTE.** It is to the interest of an approved society that any remedy which a member has against a third party shall be prosecuted to a successful conclusion. It is well-known that insurance companies include in their policies a power to prosecute actions on behalf of the insured, and somewhat similar provisions are included in the rules of approved societies. The only real question in issue in this appeal is the proper construction of the relevant rules of the society. If they imposed a duty on the society to take effective action in such a case, the appellant was entitled to succeed, but the court has held that, although the rules gave the committee a power to take proceedings, they imposed no duty on them to do so. There is a subsidiary point as to whether what had been done would support an inference that the committee had contracted to prosecute the proceedings, and the position generally is carefully considered in the judgments of the court.

As to Duties of Approved Societies, see HALSBURY, Hailsham Edn., Vol. 34, p. 653, para. 830; and for Cases, see DIGEST, Vol. 44, pp. 1311, 1312, Nos. 156-162.]

Appeal by the plaintiff from an order of Hilbery, J., dated May 27, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

Linton Thorp, *K.C.*, and *V. Stephenson* (for *C. A. Morgan Blake* on war service) for the appellant.

F. A. Sellers, *K.C.*, and *A. A. Pereira* (for *R. Marven Everett* on war service) for the respondents.

Thorp, K.C.: The society was negligent in not informing the appellant that he was running a risk in letting the time go by. It cannot be said that the society had no power to act for the appellant. Rule 9 would appear to invest the secretary with the power to take all necessary steps to protect a member. The society has a claims department, and must exercise the skill which it holds itself out as possessing. The committee ratified what had been done by the secretary. There was a contract to act as a reasonable claims department of an approved society should act.

Sellers, K.C.: It was said by Hilbery, J., that the committee of management would be the body to undertake the claim if it could be undertaken at all. The members must be taken to know the rules. The committee must investigate cases to ascertain if compensation is payable or if it is being paid. The judge was right in saying that, under the rules, the secretary could not undertake on behalf of the society any such duty as the appellant relied upon, because the secretary was not empowered so to act. [He was stopped by the court.]

Lord Greene, M.R.: The appellant was a member of the National Union of Railwaymen's Approved Society, which was set up under the provisions of the National Health Insurance Act, 1924. He was involved in an accident and suffered severe personal injuries. He claimed in this action that the society had been guilty of negligence, in that it had assumed on his behalf the responsibility for taking legal proceedings to recover damages against the other party to the accident—namely, the Kent County Council by one of its motor-drivers—and in breach of its duty had omitted to commence those proceedings within the period of six months allowed by the Public Authorities Protection Act, 1893. He claimed that, as a result of that delay, the chance of obtaining damages was lost to him.

It is obvious that many questions arise for consideration in an action of this character. It would have been necessary for the court to decide whether the appellant had lost the opportunity of taking proceedings, or, in other words, whether the case was one to which the Public Authorities Protection Act, 1893, would have afforded a good defence. It would also have been necessary for the court, if the plaintiff had succeeded on the other issues in the case, to estimate his chances of recovering damages against the Kent County Council. Those matters would have had to be considered and dealt with by the court in the absence of the Kent County Council, who would have been the defendants to the action if it had been brought. However, upon the view which I take in this case, matters of that kind do not arise for decision, because I agree with HILBERY, J., who tried the action, that the plaintiff's case fails *in limine*. In order to succeed, it was necessary for the plaintiff to show that the respondent society had imposed upon it by contract, or by some assumption of a duty, the obligation of instituting those proceedings on his behalf, or that in some way it ought to have informed him of the legal position with regard to the Public Authorities Protection Act, 1893, so as to enable him to institute the proceedings himself within due time if the society failed to do so.

In order to consider whether the plaintiff could succeed in establishing such a case, it is necessary to consider shortly one or two of the rules of the society. It is to be remembered that this society was established for the definite object of administering on behalf of its members the provisions of the National Health Insurance Act. It had, and has, in a collateral way, an interest in the position of any of its members *vis-a-vis* third persons against whom such members may have claims for damages in respect of any accidents in which the members have been injured and thereby become entitled to benefits. That interest, however, is really collateral and subsidiary to its main activities, and it is wrong to approach the rules of the society with the idea that its functions will be found to be the same as those which many trade unions assume on behalf of their members of fighting their battles for them.

The rule which gives the society power to interest itself in claims by its members against third parties of that description is r. 7 (15), which provides as follows:

> The committee shall have power to institute legal proceedings on behalf of members of the society in cases where it may deem it advisable so to do, and may direct the institution of any legal or other proceedings or inquiries which it may consider desirable in the interests of the society or its members.

The committee there referred to is the executive committee, but in practice, under r. 7 (30), the business of considering matters of that kind fell to the management committee.

It is to be noticed that r. 7 (15) does not impose on the committee any obligation whatsoever to institute legal proceedings on behalf of members. It gives the committee power to do so only in cases where it may deem it advisable so to do, and, accordingly, on the face of this sub-rule, the power of the committee to institute legal proceedings on behalf of members arises only where the committee has taken the matter into its consideration and come to a conclusion on the matter.

There is one more rule to which I must refer in terms, and that is r. 9. The rule deals with the position and duties and powers of the general secretary, and sub-rule (6) provides as follows :

> He shall investigate all cases where insured members are suffering from the result of accidents and obtain all information necessary for the information of the committee.

Reading that in connection with r. 7 (15), I think that the procedure laid down for the society in accident cases is perfectly clear and businesslike. The general secretary is given the duty of investigating and reporting to the committee. When the committee has before it the information it requires, it deliberates and decides whether or not it will exercise the power conferred upon it by sub-rule (15). It is perfectly clear, on the face of these rules, that the general secretary has no power himself to assume any responsibility towards a member for instituting proceedings. He cannot himself set proceedings in motion. His function is that of investigation and report, and nothing more.

In the present case, all the dealings which are relevant to the plaintiff's claim were dealings with Frank Bailey, the general secretary of the society, subject to what I shall say in a moment with regard to what the committee did when the matter came before it. It is contended on behalf of the appellant that the secretary had power to assume towards the appellant the responsibility of undertaking on his behalf to set his claim duly in motion. I have already said that there is no express power in these rules for the general secretary to do anything of the kind, but it is argued, in the first place, that he had ostensible authority to bind the society by an undertaking to perform that task on behalf of the appellant. In my opinion, that argument is founded upon a misconception.

In cases where the powers and duties of an agent are to be found in a written document, the terms of which are known to the person dealing with the agent or are to be assumed to be known to him, there is no room for the doctrine of ostensible authority. The ostensible authority and the actual authority in such cases are co-terminous. Ostensible authority comes into play in cases where the person dealing with the agent is ignorant of the precise scope of the agent's authority, and he is entitled, in the circumstances of the case, to believe that the scope of that authority is of a certain extent. There can be no such result in the present case, because the scope of the agent's authority is laid down in perfectly clear terms in black and white.

I do not at this stage find it necessary to examine exactly what it was that the general secretary was apparently doing in the matter. When I say apparently, I mean to the eye of the appellant and his father, who was interesting himself in the matter on his behalf. All I need say is that, having carefully considered the correspondence, which is all that is relevant in the present case for this purpose, I do not find that the general secretary even went so far as to assume, or to appear to assume the obligation which it is sought to extract from the letters which he wrote. However, quite apart from that consideration, even if he had assumed, or given the appearance of assuming, any such obligation, he had no power to bind the society by what he said or did in that behalf.

Then it is said that, notwithstanding those considerations, the committee in fact ratified and adopted the attitude of its general secretary, which, for present purposes, I am assuming, contrary to my own view, in the appellant's favour, was such as to assume, or to appear to assume the responsibility alleged. In my opinion, the committee did nothing of the kind. It is necessary to see how the matter came before the committee. The accident took place on Apr. 3, 1936, and accordingly the period of six months allowed under the Public Authorities Protection Act, 1893, expired on Oct. 2, 1936. The first appearance of the committee on the scene was on Sept. 14, 1937, nearly a year after the period of six months had elapsed. On that date the matter was submitted to the committee by Bailey, the general secretary, in circumstances which appear in his letter of Sept. 14, 1937, to the appellant's father. In that letter he says:

> In view of the serious nature of the injuries I propose placing the papers before the management committee with a request that same be forwarded to the society's solicitors for an opinion as to the chances of success in an action for damages, and will communicate with you again in due course.

In point of fact, the matter was not even then really ripe for the consideration of the committee, because the appellant had not furnished his own statement as to the circumstances of the accident, and without those it was obviously impossible for the committee to deal with the matter. That statement had been asked for by a letter from Bailey to the appellant's father on May 18, 1936, but it had not in fact been furnished by Sept. 14, 1937. However, notwithstanding that fact, Bailey, as he says in his letter, in view of the serious nature of the injury, determined to put the matter before the committee. It came before the committee on Sept. 14, and the committee, as might have been expected, resolved that the matter be deferred for further particulars, that there must be a statement duly signed by the member, and that, on receipt of that, the matter was to be submitted to Messrs. Pattinson & Brewer, who were the society's solicitors. There we have in operation the machinery provided by r. 9 (6) and r. 7 (15).

The signed statement by the appellant which was asked for was furnished by a letter from him dated Oct. 16, 1937, and, with that letter before them, on Oct. 26, 1937, the committee resolved that they would take legal action. That decision was afterwards rescinded when it became clear that the Kent County Council, who would have been the defendants in the action, were determined to plead the Public Authorities Protection Act, 1893, or, rather, their insurers had made that decision, by which, of course, the Kent County Council would be bound under the ordinary policy. When they ascertained that and had taken the advice of solicitors and counsel, the committee decided that they would not proceed further in the matter. Of course, by that time the period of six months had long since elapsed. In fact, it had elapsed before the matter ever came before the committee at all.

In those circumstances, is it possible, even assuming that the committee would have been acting *intra vires*, to spell out from the actions of the committee some ratification of what, on this branch of argument, was the unauthorised assumption by the general secretary of duties towards the appellant in respect of commencing proceedings on his behalf ? I can find nothing of the kind. The committee was doing nothing more than carrying out its functions under rule 7 (15). They reached the stage of actually deciding to take proceedings, but that decision was, in my judgment, one to which the appellant had no right to hold them, and in any event, even if he had had a right to hold them to it, the decision was taken long after the period of six months had expired.

It certainly looks as though the general secretary had not appreciated the necessity for speedy action in the case. However that may be, I cannot find that either he or the committee assumed or were under any duty towards the appellant, and, in consequence, the whole foundation of the appellant's claim in the action disappears. Whether that result is one which is fortunate or unfortunate for the appellant it is unnecessary to speculate. If he had a good cause of action and would have succeeded in a claim if it had been brought, then it is a misfortune for him that he has not been able to put it forward, assuming, as I am assuming, that the Public Authorities Protection Act, 1893, was a good defence. On the other hand, if his claim was one which, on investigation, would have turned out to be ill-founded, he has at any rate benefited by not being involved in unsuccessful litigation. On the present appeal, however, there is nothing we can do, save to dismiss the appeal with costs.

GODDARD, L.J. : I agree. I only want to add one word to what LORD GREENE, M.R., has said. In my opinion, there can be no suggestion here that Bailey, the general secretary, in any way misled the plaintiff or his father. There is no ground for suggesting here that either Bailey or the rules of the society made any representation or suggestion that they were carrying on a legal aid department. The impression which the correspondence between the plaintiff's father and Bailey leaves in my mind is that the branch secretary of this society at Maidstone was in the habit of communicating with Bailey on what he no doubt called legal matters—that is to say, matters relating to the interpretation of the Act, and the rules, and so forth. He may have thought that

Bailey was in a position to give him legal advice, but I cannot see that Bailey in any way represented that he was in a position to give legal advice or that there was anything in the nature of a legal aid department in the society.

All that Bailey offered to do in his letter of Apr. 21 was to see if, when he got certain particulars—which, incidentally, he did not get until the period of six months had expired—he could arrange an amicable settlement. He could not arrange an amicable settlement, but it is no reflection on Bailey to say that he probably did not know—and I do not suppose for a moment that he did know—of the provisions of the Public Authorities Protection Act, 1893. If the plaintiff has suffered misfortune by reason of the action not being brought within the period of six months, and if it be the case that his claim is void by reason of the provisions of that Act, he is only one more victim of that piece of legislation, which does, in many cases, work harshly. That, however, is not a matter for this court. Parliament deliberately enacted that actions against public authorities for any act done in discharge of a public duty must be brought within six months, and not afterwards. They have now extended the time to twelve months, but the principle of the Act still remains. It may be a very unfortunate case for the plaintiff, but I cannot see that he has any legitimate grievance against either Bailey or the approved society.

DU PARCQ, L.J.: I also agree, for the reasons given by LORD GREENE, M.R., and I wish to express my concurrence in what has been said by GODDARD, L.J.

Appeal dismissed with costs.

Solicitors: *Outred, Maclean & Co.* (for the appellant); *Pattinson & Brewer* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re V.G.M. HOLDINGS, LTD.

[CHANCERY DIVISION (Morton, J.), **September 22, 1941.**]

Execution—Stay of execution—Order passed and entered—Jurisdiction to vary amount of security.

Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio,* and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

[**EDITORIAL NOTE.** This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is *functus officio,* and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction. It was here argued that, in the matter of the variation of the amount of security to be given on a stay of execution, this rule did not apply, but the judge has decided against that contention.

As to Stay of Execution, see HALSBURY, Hailsham Edn., Vol. 14, pp. 31-33, paras. 61, 62; and for Cases, see DIGEST, Vol. 21, pp. 442-454, Nos. 252-368.]

Application by the respondent for a variation of the terms of a stay of execution. The facts are fully set out in the judgment.

W. Raymond Jennings for the applicant. A

H. J. Wallington, K.C., and *E. J. Hecksher* for the respondent.

Morton, J.: On Aug. 26, 1941, Bennett, J., made an order in this matter under which he ordered the respondent, Charles Vivian Vanbergen, to pay the sum of £15,980, together with certain interest, to the applicant, B who is the liquidator of V. G. M. Holdings, Ltd. He also ordered the respondent to pay to the applicant the costs of that application.

There having been at the hearing an application by the respondent for a stay of execution pending an appeal, the order continues as follows:

> It is ordered that upon the said Charles Vivian Vanbergen giving security to the C satisfaction of this court in the sum of £5,000 within four weeks from the date of this order and giving notice of such appeal within like period and within like period duly entering same for hearing, execution under this order is stayed until such appeal has been heard or otherwise disposed of.

The four-weeks' period stated in the order has almost expired, and I am told by counsel for the respondent that the security for £5,000 has not D yet been given. The respondent, by his counsel, has applied to me for an order that, if £3,000 is paid into court within the next seven days, there shall be a stay of execution.

It is submitted for the applicant (i) that I have no jurisdiction to make any such order, and (ii) that, if I have jurisdiction, the facts do not E justify the making of the order. I feel the gravest doubt whether, if Bennett, J., were sitting to-day, he would have jurisdiction to make the order asked for. The order upon the application has been made by him and passed and entered. He has exercised his jurisdiction as to the amount of the security which should be given and as to the time within F which the security should be given, and I am disposed to think that he is *functus officio*. I think that it would be a strange position if a judge were at liberty to reconsider his decision and grant a stay of execution after he had made an order refusing it. I think that, when a judge has made an order such as that in the present case, the only remedy for the respondent, G if he is dissatisfied with the order, is to go to the Court of Appeal, which in this case he did not do. In my view, neither Bennett, J., if he were sitting to-day, nor myself has jurisdiction to make the order asked for, but, assuming that I have jurisdiction, I should not feel justified, on the facts as now presented to me, in making the order asked for. H

Application refused.

Solicitors: *Sidney Pearlman* (for the applicant); *C. Butcher & Simon Burns* (for the respondent).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN N. V. GEBR. VAN UDENS SCHEEPVAART EN AGENTUUR MAATSCHAPPIJ AND SOVFRACHT.

A [COURT OF APPEAL (Lord Greene, M.R., and Goddard and du Parcq, L.JJ.), **October 13, 14, 15, 20, November 5, 1941.**]

Aliens—Enemy alien—Company incorporated and carrying on business in enemy-occupied territory—Whether company enemy alien—Continuation of arbitration proceedings—Trading with the Enemy Act, 1939 (*c.* 89)—*Defence* (*Trading with the Enemy*) *Regulations,* 1940 (*S.R. & O.*, 1940, *No.* 1092).

B *Arbitration—Claimant in enemy-occupied territory—Proceedings commenced before enemy occupation—Continuation of proceedings—Whether solicitor's retainer determined.*

The respondents, a company incorporated under the law of the Netherlands and carrying on the business of shipowners with their principal place of business at Rotterdam, chartered one of their vessels C to the appellants, a Russian company. A clause in the charterparty provided for arbitration in London. Disputes having arisen between the parties, in Apr., 1940, each party appointed an arbitrator, but, before the matter could proceed further, the German invasion of the Netherlands took place, and the country was occupied by the enemy in May, 1940. The appellants and their arbitrator subsequently refused to proceed with the arbitration, on the ground that the respondents D had, in the circumstances, become enemies. On June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. It was contended for the appellants that the summons should be dismissed (i) by reason of the German occupation of the Netherlands, the respondents had become enemy aliens at common law, (ii) the respondents had become enemies under the Trading with the Enemy Act, 1939, or (iii) the retainer of the respondents' solicitors determined as soon as E the Netherlands became enemy-occupied territory :—

HELD : (i) at common law, a company incorporated under the laws of an allied country which has been occupied by the enemy is not, by reason of the mere fact that it continues to carry on its business in that country, to be treated as an enemy alien to the extent that it is incapacitated from taking proceedings in the English courts to recover a trade F debt.

(ii) the Trading with the Enemy Act, 1939, does not make a person an enemy alien if he is not one at common law. The Act prohibits certain dealings with a person of the class defined in sect. 2 (1) as extended by the Defence (Trading with the Enemy) Regulations, 1940, and also makes certain provisions respecting the property of such person. Otherwise, the status of such a person is not affected.

G (iii) the retainer of the respondents' solicitors was not determined when the respondents became enemies for the purpose of the Trading with the Enemy Act, 1939.

[**EDITORIAL NOTE.** The only matter that is of importance in this decision is that which arises out of the definition of an alien enemy at common law. It has been said that a subject of an enemy state, if he is neither residing nor carrying on H business in an enemy country, may not be an alien enemy with reference to civil rights. The position of the subject of an allied state should certainly be no worse than that of a subject of an enemy state. The real difficulty, perhaps, arises out of the question how far a country wholly occupied by the enemy can be said to be enemy territory, if it has not been formally annexed by the enemy. After reviewing all the authorities, the Court of Appeal have decided that the present position of Holland is not such that a Dutch subject remaining there and carrying on his business is an alien enemy at common law.

As to Alien Enemy, see HALSBURY, Hailsham Edn., Vol. 1, pp. 447, 448, paras. 754, 755 ; and for Cases, see DIGEST, Vol. 2, pp. 139-146, Nos. 144-199 ; see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE : [2].]

Cases referred to :

(1) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel (S.) & Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857 ; 2 Digest 156, *260* ; 84 L.J.K.B. 1001 ; 112 L.T. 313.
(2) *The Anglo-Mexican*, [1918] A.C. 422 ; 2 Digest 144, *183* ; 87 L.J.P. 33 ; 118 L.T. 260.
(3) *Societe Anonyme Belge des Mines d'Aljustrel (Portugal)* v. *Anglo-Belgian Agency, Ltd.*, [1915] 2 Ch. 409 ; 2 Digest 153, *241* ; 84 L.J.Ch. 854 ; 113 L.T. 583.
(4) *Re Deutsche Bank (London Agency)*, [1921] 2 Ch. 291 ; Digest Supp. ; 90 L.J.Ch. 449 ; 126 L.T. 20.
(5) *Thurn & Taxis (Princess)* v. *Moffitt*, [1915] 1 Ch. 58 ; 2 Digest 156, *259* ; 84 L.J.Ch. 220 ; 112 L.T. 114.
(6) *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284 ; 2 Digest 156, *261* ; 85 L.J.K.B. 374 ; 113 L.T. 949.
(7) *Donaldson* v. *Thompson* (1808), 1 Camp. 429 ; 11 Digest 465, *1204*.
(8) *The Hoop* (1799), 1 Ch. Rob. 196 ; 2 Digest 155, *253*.
(9) *Gist* v. *Mason* (1786), 1 Term Rep. 88 ; 2 Digest 166, *361*.
(10) *The Gerasimo, The Aspasia, The Achilles* (1857), 11 Moo. P.C.C. 88 ; 2 Digest 143, *177* ; 29 L.T.O.S. 269.
(11) *The Bolletta* (1809), 1 Edw. 171 ; 37 Digest 591, *279*.
(12) *The Santa Anna* (1809), 1 Edw. 180 ; 37 Digest 583, *183*.
(13) *Bromley* v. *Hessletine* (1807), 1 Camp. 75.
(14) *Roberts* v. *Hardy* (1815), 3 M. & S. 533 ; 2 Digest 140, *152*.
(15) *The Ocean* (1804), 5 Ch. Rob. 90 ; 2 Digest 145, 191.
(16) *Meyer* v. *Dreyfus (Louis) et Cie.*, [1940] 4 All E.R. 157 ; Digest Supp. ; 163 L.T. 335.
(17) *Tingley* v. *Muller*, [1917] 2 Ch. 144 ; 2 Digest 142, *163* ; 86 L.J.Ch. 625 ; 116 L.T. 482.
(18) *Geiringer* v. *Swiss Bank Corpn., Oesterreichische Creditanstalt* v. *Geiringer*, [1940] 1 All E.R. 406 ; Digest Supp.
(19) *Central India Mining Co.* v. *Societe Coloniale Anversoise*, [1920] 1 K.B. 753 ; Digest Supp. ; 89 L.J.K.B. 769 ; 122 L.T. 451.

Appeal by the respondents from an order of Asquith, J., dated July 17, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

Gerald A. Gardiner for the appellants.

A. J. Hodgson for the respondents.

Gardiner : The first question is whether or not the respondents are enemy aliens. Subject to the power of the Custodian, it is conceded for the respondents that they are enemy aliens under the Trading with the Enemy Act, 1939. Assuming that they are enemy aliens under the Act, and assuming, against the appellants, that the letter of the Custodian is an effective licence, the respondents are still enemy aliens at common law. The Court of Appeal has held that an enemy alien cannot commence proceedings in the courts in time of war, but there is no authority holding that he cannot commence arbitration proceedings. A distinction must be drawn between a private citizen and a trader. If a person decides to continue trading, he becomes an enemy alien. One must have regard to the nature of the enemy occupation. In *The*

Gerasimo (10), it was held that the national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. The temporary occupation of a country by an enemy does not in itself convert that country into enemy territory. A The court, however, is entitled to find that the present German domination of occupied countries is absolute. In the circumstances which exist to-day, every trader in Holland is an alien enemy, because he has, of necessity, to assist the enemy. *Porter* v. *Freudenberg* (1) is authority for saying that anyone who is voluntarily resident in an enemy country, B or who is trading there, is an enemy alien. In *Societe Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ltd.* (3), Belgium, as a whole, was not territory in hostile occupation. That, however, cannot be said of Holland at the present time. A trader must necessarily be of assistance to the enemy except in an exceptional case C such as *The Gerasimo* (10). There has been a notification in the LONDON GAZETTE that the Netherlands must be regarded as enemy-occupied territory, and, therefore, the respondents are alien enemies under the Trading with the Enemy Act, 1939, s. 1. In the circumstances, the respondents' solicitors have no authority from their clients to continue D these proceedings. [Counsel referred to *Bromley* v. *Hessletine* (13), *Roberts* v. *Hardy* (14), *The Ocean* (15), *Meyer* v. *Dreyfus* (*Louis*) *et Cie.* (16) and *Tingley* v. *Muller* (17).]

Hodgson : The respondents are not alien enemies at common law, because Holland is neither an enemy country nor hostile territory. E It is vital to distinguish between the words "hostile territory" and "territory in hostile occupation," which are used in *Porter* v. *Freudenberg* (1). There is no case in the books where a person or a company resident or trading in enemy-occupied territory has been held to be an enemy alien at common law. The mere fact that there is trading in enemy- F occupied territory is not enough. The distinction between enemy territory and enemy-occupied territory is shown in *Societe Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ltd.* (3). In the present war, there are large portions of the Dutch dominions which are not in the occupation of Germany, although Holland itself has G been overrun. There was joint allied resistance before Holland was overrun, and there is still joint allied resistance. As to whether or not a man who is trading in enemy-occupied territory is assisting the enemy, the only authorities which throw any light upon the matter are *Porter* v. *Freudenberg* (1), *Societe Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. H *Anglo-Belgian Agency, Ltd.* (3) and *Re Deutsche Bank* (*London Agency*) (4), where it was said that the Banque de Bruxelles was not an enemy subject within the meaning of the Trading with the Enemy Amendment Act, 1916, but was resident in enemy-occupied territory and carrying on business against its will. In *Bromley* v. *Hessletine* (13), LORD ELLENBOROUGH said, at p. 77, that, supposing a British merchant were entrapped and confined in an enemy's country, it could scarcely be said that all the trade he might still carry on was in aid of the King's enemies, illegal and incapable of being insured. The Trading with the Enemy Act, 1939, does not alter the procedural status of the respondents. It only makes it impossible for them, since they are in enemy-occupied territory, to enforce their rights without a licence or authority. Persons A living in their own country, although it be occupied by the enemy, remain subjects of their lawful sovereign. [Counsel referred to *Meyer* v. *Dreyfus* (*Louis*) *et Cie.* (16) and *Geiringer* v. *Swiss Bank Corpn.* (18).]

Gardiner, in reply, referred to *Central India Mining Co.* v. *Societe Coloniale Anversoise* (19). B

LORD GREENE, M.R.: The respondents, a company incorporated under the laws of the Netherlands and carrying on the business of shipowners, with their principal place of business at Rotterdam, chartered one of their vessels to the appellants, a Russian company. Disputes C arose between the parties, and the respondents sought arbitration under the arbitration clause in the charterparty, which provided for arbitration in London. During Apr., 1940, each party appointed an arbitrator, but, before the matter could proceed further, the German invasion of the Netherlands took place, and the country was occupied by the enemy D in the second week of May, 1940. The appellants and their arbitrator subsequently refused to proceed with the arbitration, on the ground that the respondents had, in the circumstances, become enemies, and ultimately on June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. This application was granted by the master, E and his order was upheld by ASQUITH, J., on appeal. It is from this order of ASQUITH, J., that the present appeal is brought.

On behalf of the appellants, it was submitted, in the first place, that, on the occupation of the Netherlands by Germany, the respondents became aliens at common law, by reason of the fact that they continued to carry F on business in what had thus become enemy-occupied territory. It was admitted on behalf of the respondents that, if this proposition were established, the appellants were entitled to succeed, since the status of enemy aliens thus acquired would have prevented them from initiating proceedings in the British courts without a licence from the Crown, and G no such licence had been obtained. The next argument presented on behalf of the appellants was that the respondents had become enemies under the Trading with the Enemy Act, 1939, and that this disabled them from taking proceedings in English courts. In answer to this argument, reliance was placed by the respondents on a letter purporting to be signed H on behalf of the Custodian of Enemy Property, which I will refer to more particularly hereafter. The third and last argument was that, in the circumstances, the retainer of the respondents' solicitors determined as soon as the Netherlands became enemy-occupied territory, and that the application, therefore, could not be entertained by the court once this fact was brought to its notice.

The first argument—namely, that the respondents became alien enemies at common law when the Netherlands were occupied by the Germans—was based on the proposition that a person not being an enemy national who carries on business in territory occupied by the enemy—at any rate, where the occupation is of the present nature—is, so far as regards enemy character, in precisely the same position as is a similar person who carries on business in enemy territory. In the case of such persons carrying on business in enemy territory, the law is clear. They *ipso facto* acquire the character of alien enemies, so far, at any rate, as regards their interest in the business and its assets : *Porter* v. *Freudenberg* (1) and *The Anglo-Mexican* (2), at p. 425. One result which flows from this situation is that such traders are incapacitated from taking proceedings in the English courts for the purpose of recovering a debt due to the business, and no British subject can have any intercourse with them or give them any assistance in connection with the business. It follows that no one can lawfully act for them for that purpose or in that connection. The reason for this is, as appears from the judgment in *Porter* v *Freudenberg* (1), at p. 868, that English law forbids acts :

> . . . that will or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state.

In the case of friendly territory which has been occupied by the enemy, however, very different considerations appear to me to apply. Such occupation gives rise to no change in allegiance, nor does a national of the country occupied (to quote the language of the Privy Council in *The Anglo-Mexican* (2), at p. 425, in reference to a neutral in an enemy state) submit himself to, or take the benefit of, the laws of the enemy state and in effect become one of its subjects. In one sense, it may, no doubt, be true that everyone who continues to trade in a country which has been occupied by the enemy does, or may, thereby benefit the enemy. Trade by individuals increases wealth, and that wealth may be seized by the enemy. Manufacture produces goods which may be requisitioned by the enemy. The mere fact that the normal machinery of life is kept working benefits the enemy in the sense that he is thereby relieved, in whole or in part, of the necessity of maintaining the population out of his own resources. *Prima facie*, however, the activities of a trader in enemy-occupied territory are not directed to these ends, and to say that the mere act of trading must necessarily stamp him with enemy character appears to me to disregard the realities of the situation. Everyone who is living in enemy-occupied territory and has not adhered to the enemy in some way or another is primarily concerned with the continuity of life in that territory. The inhabitants must eat and be clothed. Industry and commerce must go on if the community is to exist. The butcher who continues to sell meat in his shop and the manufacturer who continues to make boots in his factory are concerned with providing the necessaries of life for the community, and neither the fact that the meat or the boots

may be requisitioned by the enemy, nor the fact that the improved credit of the trader or manufacturer gives an opportunity for pecuniary extortion, nor the fact that, if the butcher did not supply the meat or the manufacturer the boots, the enemy, if sufficiently humane, might feel constrained to supply them out of his own resources, appears to me to A
justify the proposition that the mere act of trading in itself induces enemy character. Of course, a man may actively and intentionally (though perhaps unwillingly) assist the enemy—for example, if he manufactures munitions of war for the enemy. In such a case, it might well be argued that he had acquired the status of an alien enemy—at any B
rate, so far as his business was concerned, and possibly in other respects too—but I express no opinion on that matter. There is no question in the present case of actual assistance given to the enemy. The only evidence with regard to the respondents' business is contained in the affidavit of the respondents' solicitor, who says, in para. 4, that the C
respondents "are a Dutch company with their principal place of business at Rotterdam." This evidence, in my opinion, is quite colourless. In truth, the argument really involves the proposition that the inhabitants of the Netherlands are to be treated as co-belligerents with Germany. That Dutch territory and its inhabitants must, for certain purposes and D
in certain circumstances, be regarded as having an enemy character at common law is no doubt true. For instance, it could scarcely be disputed that goods consigned to a destination in the Netherlands could lawfully be captured at sea in the same way as goods consigned to Germany itself: HALL'S INTERNATIONAL LAW, 8th Edn., p. 603, and cases there cited. This, E
however, is far from establishing the general proposition. The principles on which the common law is based in these matters are extremely difficult to apply in modern circumstances, a fact which explains and justifies the passing of such legislation as the Trading with the Enemy Act, 1939. The question which we have to consider, however, is a narrow one. It is F
whether or not a company incorporated under the laws of an allied country which has been occupied by the enemy is, by reason of the mere fact that it continues to carry on its business in that country, to be treated as an alien enemy to the extent that it is incapacitated from taking proceedings in the British courts with a view to recovering a business G
debt. I can find nothing in principle or in authority to compel me to give an affirmative answer to this question.

I am glad to be able to avoid coming to a conclusion which would mean that a loyal subject of an allied sovereign, by the mere fact of continuing to carry on business, and thus presumably helping his countrymen to H
preserve some measure of decent living in circumstances of terrible hardship and difficulty, must perforce be regarded by British courts as an enemy alien disentitled to their protection. The subject is one on which there is no direct authority, but the view which I take appears to be, at any rate, consistent with three expressions of judicial opinion, the first by YOUNGER, J., in *Societe Anonyme Belge des Mines d'Aljustrel (Portugal)*

v. *Anglo-Belgian Agency, Ltd.* (3), at p. 414, the second by LORD COZENS-HARDY, M.R., in the same case, at p. 419, and the third by RUSSELL, J., in *Re Deutsche Bank* (*London Agency*) (4), at p. 295.

I will now deal with the second argument, based on the Trading with the Enemy Act, 1939. By sect. 2 (1) of that Act, the expression "enemy" is, for the purposes of the Act, defined, but the definition there set out does not include a person in the position of the respondents. This definition, however, was extended by the Defence (Trading with the Enemy) Regulations, 1940, reg. 3, so as to include :

> . . . as respects any business carried on in enemy territory, an individual or body of persons (whether corporate or [unincorporate]) carrying on that business.

"Enemy territory" is defined in sect. 15 (1) of the Act, the relevant words being :

> . . . any area which is in the occupation of a power with whom His Majesty is at war . . .

The Trading with the Enemy Act, 1939, does not purport to impose or define enemy status otherwise than for the purposes of the Act, which are (so far as relevant) the prohibition of dealings with persons who, for the purposes of the Act, are to be regarded as enemies. It achieves its object by prohibiting such dealings, and not by any general extension of the class of enemies at common law. A person, therefore, who is not an enemy at common law is not by the Act made an enemy. All that the Act does is to prohibit certain dealings with a person of the defined class and to make certain provisions affecting his property. Except for the purposes of those prohibitions and those provisions, his status is unaffected.

In the present case, it is clear that, for the purposes of the Act, the respondents became enemies, as respects their business, when the Netherlands were occupied by the Germans. The result was that it was illegal thereafter for anyone to act for them in proceedings in the British courts to recover a business debt or to enforce a business claim, and it was illegal for the appellants to discharge their business obligations to them. If the matter had stood there, the appellants would have been right in their contention that the respondents' application could not be entertained by the court, not on the ground that the respondents were under a personal disability as enemies to sue (as would have been the case had they been alien enemies at common law), but on the ground that the court could not listen to an application which, on the face of it, involved the commission of a criminal offence. The respondents, however, refer to the proviso to sect. 1 (2) of the Act, which says that a person shall not be deemed to have traded with the enemy by reason only of the fact that he has done anything under an authority given

> . . . by, or by any person authorised in that behalf by, a Secretary of State, the Treasury, or the Board of Trade.

They claim that such an authority was given to them by the letter signed on behalf of the Custodian of Enemy Property to which I have already referred, and ASQUITH, J., accepted their contention. With all respect to the judge, I do not agree with his view. The letter, which is dated

May 22, 1940, and addressed to the respondents' solicitors, is in the following terms :

> Trading with the Enemy Act, 1939, s.s. Waalhaven in arbitration.
>
> The Custodian has your letter of May 20. There will be no objection so far as the Trading with the Enemy legislation is concerned to your proceeding with the arbitration to which you refer on behalf of Messrs. N. V. Gebr. Van Udens Scheepvaart en Agentuur Mij. The Custodian notes that you will account to him for any sums recovered from the time charterers.

There is no regulation or order in existence which confers on the Custodian of Enemy Property authority to act on behalf of a Secretary of State, the Treasury, or the Board of Trade under the proviso to the Trading with the Enemy Act, 1939, s. 1 (2), and no suggestion was made that any special authority had been conferred upon him.

The result, in my opinion, is that the respondents' application for the appointment of an umpire was one which ought not to have been entertained. It was impossible for anyone to act on behalf of the respondents in the matter of such an application without offending against the Trading with the Enemy Act, 1939. That Act provides in sect. 1 (2) as follows :

> . . . a person shall be deemed to have traded with the enemy (*a*) if he has had any commercial, financial, or other intercourse or dealings with, or for the benefit of, an enemy and in particular . . . (iii) performed any obligation to . . . an enemy . . .

These words are wide enough to cover what was done in the present case, and, on the material before him, Asquith, J., ought, in my opinion, to have allowed the appeal from the order of the master.

We were informed by counsel for the respondents that it was the practice for the Custodian of Enemy Property to give letters of the kind under consideration in cases where it was desired to conduct proceedings on behalf of persons who were enemies within the meaning of the Trading with the Enemy Act, 1939. The Custodian has apparently thought it preferable to have such proceedings conducted privately instead of obtaining a vesting order and conducting them himself. This procedure has obvious advantages from the Custodian's point of view, but it is, in my opinion, irregular to issue letters of the kind now under consideration, and the practice of doing so ought to be discontinued. In cases where no vesting order is made, the only proper method of procedure is to obtain an authority under the proviso to sect. 1 (2) of the Act. We were informed by counsel for the respondents that there could be no doubt that such an authority could be obtained, and at the conclusion of the argument we adjourned the hearing in order that, if possible, steps might be taken to that end. In the result, two letters were produced, one, dated Oct. 15, 1941, from the Trading with the Enemy Branch (Treasury and Board of Trade), and the other, dated Oct. 18, 1941, from Sir Horace Wilson, the Permanent Secretary to the Treasury. I do not propose to inquire whether these two documents are sufficiently authenticated (see sect. 12 of the Act), since counsel for the appellants agreed to accept them as a proper authority under the proviso, which they were obviously intended to be. The authority given is, however, irregular in one respect, in that it purports to be retrospective so as to cover the action of the respondents' solicitors since May 22, 1940, a thing which it obviously cannot do.

In the circumstances, it would be a waste of time and money to compel the respondents to start afresh, as they would be entitled to do under the authority now given to them. Counsel for the appellants very properly A assented to this view, and agreed to treat the application and order now under review as having been made under the protection of that authority. The order of this court will be that the appeal is dismissed, and it will be prefaced by the statement that the appellants, by their counsel, consent to having the matter treated as though the original application and the B orders of the master and of ASQUITH, J., made thereon, had been made after Oct. 13, 1941.

It only remains to say a word with regard to the third argument—namely, that the retainer of the respondents' solicitors determined on the ground that the respondents became enemies. I express no opinion C as to the effect on a retainer where the person who gives it subsequently becomes an enemy alien at common law. In the present case, I agree with the view, which I understand was taken by ASQUITH, J., that the retainer was not determined when the respondents became enemies for the purposes of the Trading with the Enemy Act, 1939. The effect of that D Act was merely to make it illegal to act under the retainer for the benefit of the respondents unless and until a valid authority was obtained under the provisions of the Act.

GODDARD, L.J.: In this case, the appellants contend that the E respondents are enemy aliens of the King, and so are disentitled to sue in, or take any proceedings before, this court, and, accordingly, that a summons taken out by them for the appointment of an umpire in an arbitration ought to be dismissed as incompetent. The only evidence before the court is that contained in the affidavit sworn and filed by the F solicitor acting for the appellants in the arbitration, which states that they are a Dutch company—that is to say, a company incorporated under the laws of the Netherlands—and have their principal place of business in Rotterdam. It is further stated that Holland was occupied by the Germans in the second week of May, 1940, the arbitration having been G begun in the previous month. Thus, at the time when the arbitration was instituted, the appellants were neutrals, the subjects of a sovereign at peace with His Majesty, who has since become his ally. I think it is fair to draw the inference that the appellants are still trading, or endeavouring to do so, in Rotterdam, though it may be for the purpose only of winding H up their business. On this assumption, it is contended that, as they are trading in a country occupied, though not annexed, by the enemy, they must be regarded as enemies at common law. It is clear that, by reason of the Trading with the Enemy Act, 1939, no payment can be made to them so long as their country is in hostile occupation, and that, for the purposes of that Act, they are enemies. It is also clear that, at any rate from the time of LORD STOWELL, the property of a neutral having a commercial domicil in enemy territory has been liable to seizure and condemnation as prize, but there appears to be no authority on the question of whether a person living in territory occupied by the enemy but not formally annexed by or ceded to him is to be regarded as of hostile character for all purposes, so as to prohibit all proceedings by him or on his behalf in British courts. This war is not the first in which countries allied or friendly to Great Britain have been temporarily occupied, and, if the common law regarded the inhabitants of these states as enemies, one would expect to be able to find authority for this proposition, but it appears to me that such as one can find is in truth to the opposite effect. It was decided in *Porter* v. *Freudenberg* (1) that a person who resides or carries on business in enemy territory is an enemy. The court was there dealing with the case of a trader living in Germany, and not in an occupied country. Conversely, an enemy national living in Great Britain at the outbreak of war and allowed to remain is not an enemy (*Thurn & Taxis* (*Princess*) v. *Moffitt* (5)), nor does he become so if the Crown interns him (*Schaffenius* v. *Goldberg* (6)). Therefore, it is argued that, as domicil is the only test, the rule must apply just as much to persons living in territory occupied by the enemy as to those living within the confines of the hostile state. British law, however, has never recognised that mere military occupation of a country makes it part of the occupiers' dominions, and no court could assume that, so long as Her Majesty the Queen of the Netherlands is an ally of His Majesty the King of England, the kingdom of Holland has become part of Germany. LORD ELLENBOROUGH put the matter forcibly in *Donaldson* v. *Thompson* (7), where he said, at p. 433 :

> Will anyone contend that a government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields ? It may as well be contended that *neutral* and *belligerent* mean the same thing.

However, it may be asked when, then, the property of a person trading in the occupied country, should be liable to seizure and condemnation, if taken at sea, and all trading with him be prohibited. The answer, in my opinion, is that, because of the assistance which would otherwise be given to the enemy, a hostile character is imposed upon his property and on the business which he carries on. However, though such a character is imposed on his property, it does not follow that it is imposed on his person. A trader in Germany is an enemy for all purposes. Even if he leaves Germany and goes to a neutral country, he would still be regarded as *ex lege* in Great Britain for the duration of the war, if he were of enemy nationality, and for as long as he had any business interest in Germany, or intended to retain his domicil there, if he were a subject of a neutral power. I apprehend, however, that, if any Dutch subject could now escape and come to England, he would be under no enemy disability, except that, as regards trading with Holland, he would be in exactly the same position as British subjects are under the Trading with the Enemy Acts. The imposition of enemy character on property was elaborately dealt with during the last war in *The Anglo-Mexican* (2), where the judgment of the Privy Council was delivered by Lord Parker. He was dealing there with the case of a neutral in enemy country, but I cannot conceive that the subject of a neutral or an allied sovereign in occupied territory can be in any less favourable position. Lord Parker said, at p. 425:

> It seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed to be an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicil in the country in and from which the business is carried on, and this commercial domicil, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character.

This passage seems to me to show that it is the business and its property, and not the person of the trader, upon which the enemy character is imposed. Then Lord Parker quotes from Story's Notes [Pratt's Story at pp. 60, 61] a passage which contains these words:

> So if the agency carry on a trade from the hostile country which is not clearly neutral, and if a person be a partner in a house of trade in an enemy's country, he is, *as to the concerns and trade of that house,* deemed an enemy and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country, for the domicil of the house is considered in this respect as the domicil of the partners.

The italics are mine. It is true that this passage ends with these words:

> It is a settled principle that traffic alone independent of residence will, in some cases, confer a hostile character on the individual.

It is clear that that learned author did not mean to imply that a neutral who traded with one belligerent thereby became the enemy of the other, for obviously such a neutral does not, even if he trades in contraband, and, in my opinion, the author is doing no more than emphasising that hostile character may attach to a neutral's property. The matter may, indeed, be carried further by considering the case of a British subject who trades with the enemy. In *The Hoop* (8), goods shipped by the enemy and consigned to British subjects in whom the property had vested as the result of a sale were held liable to condemnation, although the transaction had taken place in good faith and in the belief that certain orders in council permitted them to import the cargo, and the importers had been so informed by the Commissioners of Customs. Sir William Scott, in his classic judgment in that case, elaborately reviewed the authorities, and showed that it was an established rule that trading with the enemy, except under royal licence, subjected the goods to confiscation, and that this rule had been enforced, not only against British subjects, but also against allies. Nevertheless, no one has ever suggested that a British subject who trades with the enemy acquires a hostile character, or is guilty of treason. Indeed, it does not seem to have been settled till the reign of William III that trading with the enemy was an offence, and then it was only declared to be a misdemeanour: *per* Lord Mansfield, C.J., in *Gist* v. *Mason* (9). If trading in occupied territory of itself invests the trader personally with a hostile character, it seems to follow that, if any part of Great Britain or the Empire is invaded, a shopkeeper in a place temporarily under enemy control will become an enemy of the King. At the present moment, every trader of the Channel Islands would be in this embarrassing position. Indeed, I cannot see why the doctrine, if such there be, should be confined to traders, for, under conditions of modern warfare, it is not only from traders that an enemy can get assistance, however involuntarily it may be afforded. Inhabitants A of occupied territory may be made to pay levies or taxes. They may have their property seized and their persons conscripted to work for the benefit of the invader. Support for the view that hostile character is to be imputed to the trade and not to the trader is, I think, to be found in the opinion of LORD KINGSDOWN in *The Gerasimo* (10), at p. 96 : B

> The national character of a trader is to be decided *for the purposes of the trade* by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, *for the purposes of the trade*, as a subject of the power under whose dominion he carries it on.

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Again the italics are mine. Moreover, *Societe Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ltd.* (3) and *Re Deutsche Bank* (*London Agency*) (4), two cases arising in the last war, support, I think, the view that, apart from the Trading with the Enemy Act, 1939, enemy character ought not to be attributed to these respondents. I do D not burden this judgment with a discussion of the cases which have turned on the question of traders availing or not availing themselves of the opportunity of transferring themselves to other countries, for in modern warfare the courtesies and conventions of other days have ceased to have effect. The total war of to-day has but little resemblance to that E of even so comparatively recent a period of 1854. In the Crimean War, British merchants were permitted to trade with the enemy so long as their transactions were carried on through ports not affected by the blockade, a state of affairs which to-day would be frankly incredible. It may be said, however, that, by bringing arbitration proceedings, the respondents F are attempting to perform an act in relation to their trade, and that the doctrine which imposes a hostile character on trading should be invoked to prohibit this attempt. In my opinion, that would be carrying the doctrine too far, and beyond the reasons for which it was imposed. If hostile character is not engrafted on to the person of the litigant, I see no G reason why he should not be permitted to pursue remedies in the British courts, although he may not be permitted to receive the fruits of a judgment during the war. If he is to be regarded as hostile in his personal character, it follows that no suit, whatever its nature or object, can be entertained. Thus, it would follow that, if a resident in Jersey had given H a power of attorney to someone in England to safeguard or manage property which he possessed here, the attorney could not, during the war, take any steps on behalf of his principal in English courts for its protection. I can find no authority which compels me to hold anything so repugnant to every sense of justice. The interests of the realm are abundantly safeguarded by the Act, which forbids payments being made to the unfortunate creditor during the war. In my opinion, the true doctrine is that enemy character attaches to the trade and trading property, but not to the person, of a trader who has the misfortune to be a subject of a state in enemy occupation. I desire to add, however, that I do not A mean to decide more than that mere trading or residence in occupied territory is not enough to impose enemy character. The present war has shown that in some invaded countries there are nationals of those states who have so identified themselves with the invader as to make it imperative to regard them as indistinguishable from nationals of the B enemy. Of that there is no suggestion in the present case, and, for myself, I express no opinion as to what acts would be enough to cause identification, or as to whether compulsion would form any excuse.

On the remaining points raised in this case under the statute, I agree with, and can add nothing to, the judgment of LORD GREENE, M.R.

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DU PARCQ, L.J.: I agree, and, having had the advantage of reading the judgment of LORD GREENE, M.R., I have nothing to add with regard to the questions which have arisen under the statute. I think it right, however, to express in my own words the view which I have formed as to D the status of the claimants (to whom I shall refer hereinafter as the company) at common law.

In my opinion, it is a principle of the common law that he who owes allegiance, or has given his allegiance, whether voluntarily or under duress, to the sovereign of an enemy state is himself an alien enemy with E whom no British subject may have dealings, and is not entitled to maintain an action in the King's courts. Thus, the subject of an enemy sovereign, resident within the enemy's country, is an alien enemy, even though he may himself be well-disposed to Great Britain. The same principle underlies and explains the rule that the subject of a neutral or friendly F state who voluntarily resides, or carries on business, in an enemy's country is himself an alien enemy. It is an old principle of the common law that the subject of an enemy state who lives in England under the King's protection, though he is for some purposes to be regarded as an enemy alien, has many of the privileges and duties of a British subject. Among G his duties is that of giving his allegiance to the sovereign, and among his privileges is the right to maintain an action in the King's courts. If he is unfaithful to the King, he may be convicted of treason, and the reasoning of HALE'S PLEAS OF THE CROWN, 1800 Edn., Vol. I, on this point is instructive [p. 94]:

> H . . . an alien enemy living here in the condition of an inhabitant or trader may be guilty of treason as well as an alien *amy*, for he doth it *proditorie* and treacherously, and against the obligation that lies upon him, as well as any others, to be true to the prince, the benefit of whose laws and protection he holds, so long as he is under the same.

The common law, logically and with a practical sense of reality, assumed that neutral subjects living in an enemy's country were in like case, and treated them as giving their allegiance to the enemy sovereign and as being alien enemies. When, however, a friendly or neutral country, or part of it, has been occupied by the enemy, it by no means follows that the occupied territory is to be regarded as the enemy's country for the purposes of the rule which I have stated. The question still is whether the inhabitants as a whole (or, more specifically, any persons among them whose status is in question) are shown to owe, or to have given, allegiance to the enemy sovereign. The answer to this question must always depend upon the precise nature of the occupation, and in particular upon the quality of the control exercised by the occupying power and the obligations, if any, undertaken by, or imposed upon, the person whose status is in dispute. Thus, when an occupying power compelled the inhabitants of temporarily conquered territory to take an oath of allegiance to itself, and even to serve in its army, in accordance with the practice which once prevailed, it was right to regard the inhabitants of such a state as alien enemies in the full sense of the word: Oppenheim's International Law, 5th Edn., Vol. II, p. 344. On the other hand, it is clear from *The Gerasimo* (10), at p. 89, that a temporary occupation of a territory by an enemy's force does not of itself convert the inhabitants of the territory into enemies. Decisions in Prize are not directly in point when the principles of the common law are being discussed, but it is instructive to refer to, and to compare, two decisions of Sir William Scott which bring out the distinction which I am endeavouring to make. In *The Bolletta* (11), he held that, while it might be true that possession "taken by force of arms and by violence" did not change the national character of a country until it was "confirmed by a formal cession, or by long lapse of time," that character was changed by a cession transferring the territory to another sovereign. In *The Santa Anna* (12), decided in the same year, Sir William Scott declined to condemn in prize the property of friendly aliens (namely, Spaniards) [p. 182]:

> . . . though belonging to persons resident in those parts of Spain which are at the present moment under French [enemy] control.

It remains to apply to the facts of the present case what I believe to be the common law principle. The company was incorporated, and is resident, in the Netherlands. There is no evidence before us as to its present activities, except that in an affidavit sworn on June 30, 1941, a partner in the firm of solicitors representing it deposed as follows:

> The claimants are a Dutch company with their principal place of business at Rotterdam.

We were told that all but one of the company's ships are now beyond enemy control, and we really know nothing as to its present business activities. The only evidence before us as to the present condition of the Netherlands is a reference in the same affidavit to "the occupation of Holland by Germany in the second week of May, 1940." We were asked to take judicial notice of the fact that this occupation continues, and there is no dispute about this, or about the fact that some degree of control, which may well be severe, is exercised by the enemy over the inhabitants. There was no evidence and no suggestion that the Dutch as a nation, or all or any of the directors of the company, had given their allegiance to the enemy. It is not, I think, in doubt, or a matter of dispute, that Queen Wilhelmina is still the lawful sovereign of the Netherlands, although Her Majesty has for the time being lost the possession and control of that part of her dominions. The modern rule of international law seems to be that, while the occupying power exercises a military authority over the occupied territory, it does not by the mere fact of occupation exercise sovereignty over it. It need not be assumed that any acts of the German government will necessarily conform to the standards of international law, but it was not suggested at the bar, and I am not aware, that the enemy has purported to annex the Netherlands or attempted to transfer to the enemy state the allegiance which the Dutch owe to their lawful sovereign. The question for us, therefore, comes to this. Does the mere fact that a person is continuing to trade within territory occupied by the enemy impress that person with the character of an alien enemy at common law to the extent that British subjects may not lawfully have dealings with him and access to the King's courts is denied to him ? In the light of the principle which I have stated, the answer must be that it does not. There may well be cases where the occupying enemy, or some or all of the inhabitants of the occupied territory, so act that it may be a fair inference that all the inhabitants or some of them have acquired an enemy character, and each case must be decided on the facts available to the court. It must not be thought, for instance, that what is true of Holland is necessarily true of Czecho-Slovakia (a country which I name because it was mentioned in the argument), or even that what is true of a country to-day will necessarily continue to be true of it while the enemy occupation continues. I will add that, although the common law may, in certain circumstances, regard the property of one who has not himself the status of an enemy alien as enemy property for some purposes, there is, in my opinion, nothing in the facts of this case calling for the application of any such principle.

All that it is necessary to decide in the present appeal, and all that I desire to decide, is that, on the facts as known to us, there is nothing to show that the company has such an enemy character as will preclude it from acting through solicitors in England, or from presenting a claim as claimant in an arbitration, or from appearing as "actor" in the King's courts. In my opinion, the decision of Asquith, J., on this part of the case was right. I agree that the appeal should be dismissed, and that the order of this court should be in the form proposed by Lord Greene, M.R.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors : *Lawrence Jones & Co.* (for the appellants) ; *Constant & Constant* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

DOWNSBOROUGH *v.* HUDDERSFIELD INDUSTRIAL SOCIETY, LTD.
WADSWORTH *v.* HUDDERSFIELD INDUSTRIAL SOCIETY, LTD.
ARDRON *v.* HUDDERSFIELD INDUSTRIAL SOCIETY, LTD.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Lewis, JJ.), **November 11, 13, 1941.**]

Emergency Legislation—Military service—Conscientious objector—Dismissal by employer—Offence—Validity of regulation—National Service (Armed Forces) Act, 1939 (*c.* 81), *ss.* 5, 14 (4)—*National Service (Armed Forces) Prevention of Evasion Regulations,* 1939 (*S. R. & O.,* 1939, *No.* 1099), *reg.* 2 (1) (*a*), (*b*), (2).

The appellants were employees of the respondent society. The society passed a resolution that all employees appealing against military service on conscientious grounds should be dismissed. The appellants did so appeal against military service and were dismissed from their employment with the respondents. They then laid an information alleging that the respondents had committed an offence against the National Service (Armed Forces) Prevention of Evasion Regulations, 1939, reg. 2 (1) (*a*), (*b*). It was contended that that regulation was *ultra vires* the National Service (Armed Forces) Act, 1939, s. 14 (4), under which it was made :—

Held : (i) the regulation was not *ultra vires.*

(ii) the dismissal of the appellants was not an offence under the regulation, since they were not dismissed on account of any duties they might have to undertake if and when they were called up.

(iii) the proper form of a case stated is one which states the findings of fact, the contentions of the parties, the decision of the magistrate, and the questions of law which arise on the case for determination by the court.

[**EDITORIAL NOTE.** The point that the regulation was *ultra vires* was originally taken by the magistrate, and, though adopted by counsel for the respondents, was not strenuously argued, and the court found no difficulty in rejecting it. The real point was, therefore, whether the regulation, upon its proper construction, justified a conviction of the respondents. That depended upon whether the appellants had been dismissed by reason of any duties or liabilities which they were or might become liable to perform or discharge by reason of their having been called from their civil employment for service connected with the present emergency. The court has taken the view that the decision of the employees to avail themselves of the provisions of the National Service (Armed Forces) Act, 1939, in favour of conscientious objectors is not one of the duties or liabilities there referred to, and that, therefore, the employers committed no offence in dismissing them for the reason that they applied to be registered as conscientious objectors, for, putting the matter quite shortly and rather bluntly, by so doing the employees were not undertaking those duties or liabilities, but seeking to avoid them. All the members of the court have joined in making observations on the form in which the case was stated, and those observations will no doubt be noted by those concerned, but it is thought that, in the great majority of cases, the form in which cases are stated gives little cause for complaint.

As to Dismissal of Employees during the Emergency, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1041 ; and BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, [35].]

Appeal by way of case stated by the stipendiary magistrate at Huddersfield. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Valentine Holmes and *Eric Greenwood* for the appellants.

F. A. Sellers, K.C. and *Harold Rhodes* for the respondents.

VISCOUNT CALDECOTE, L.C.J. : This is a case stated by the stipendiary magistrate for Huddersfield, and the subject of the case is an information which was preferred by Arnold Downsborough. There are two similar cases stated, which relate to two other men, Ardron and Wadsworth. Although the information in each case dealt with facts slightly different from those in the other two cases, in each case the information was in respect of an offence said to have been committed by the Huddersfield Industrial Society under certain regulations with which I shall have to deal in detail. The magistrate found that no offence had been committed, and, when a case was asked for, he stated the three cases with which we have to deal.

I must say one word about the form in which the case comes before us. The form in which the magistrate has stated the case is this. He has set out a long judgment which he gave, covering all three cases together, and has left the court to ascertain his findings of fact from his judgment as best it may, and to ascertain from it the points of law upon which he desires to state a case for the opinion of the court. I cannot help saying that I hope cases stated in this form will not come before the court in future. The duty of magistrates who state a case is to find the facts and state the contentions of the parties, to express the opinion or the decision of the magistrate and to submit the questions of law which arise on the case for determination by the court. This form of case is as inconvenient as could possibly be devised. However, we are prepared to deal with the case as it stands, and I say no more upon that matter.

The National Service (Armed Forces) Act, 1939, s. 14, deals with a question which has been the subject of a good deal of public and parliamentary discussion—namely, the position of persons called up from their civil employment in order to undertake military duties. The section made it incumbent upon any employer—I am now paraphrasing very briefly the substance of the section—of a person who was called up under this Act to reinstate him in his employment at the determination of his military service in not less favourable conditions and occupation. The section does not deal expressly with the position of conscientious objectors. Indeed, they are not dealt with by the section at all as a class by themselves. The section deals with the one subject indicated by the marginal note : "Reinstatement in civil employment." The section of the Act which deals with conscientious objectors as a separate subject is sect. 5. I need hardly go through the elaborate provisions of that section, which prescribe the procedure to be followed by any person liable to be called up for service who conscientiously objects to particular forms of service or to any military service, but, speaking quite generally, and I think sufficiently accurately, it is true to say that the section empowers any person who conscientiously objects to those forms of service to apply to be registered as a conscientious objector in a special register to be kept by the Minister. Having so applied and got his name on to the special register, it then becomes his duty to make application to be dealt with on the footing that he is a person who honestly and genuinely has a conscientious objection to military service. If the man avails himself of this right, and succeeds in persuading the tribunal which has to determine the matter that he is a conscientious objector, he becomes, properly speaking, a conscientious objector. That is to say, he has asserted his objection based upon the convictions of conscience, and the tribunal has accepted his assertion as true. If, on the other hand, he is unsuccessful in persuading the tribunal, he may then submit to military service, as one of these appellants here has apparently said that he will submit, if his appeal in the proceedings under sect. 5 is not successful. If he does so submit to the decision of the tribunal, notwithstanding the fact that he first asserted that he had a conscientious objection, I suppose that it would be probably thought by most people to be a little unfair to describe him as a conscientious objector. He would, in the circumstances I have supposed, be a person who was undertaking military duties, although he might have availed himself of the powers contained in sect. 5. On the other hand, he may, if he is unsuccessful before the tribunal, resist and decline to perform the duties assigned to him, whether they are full military duties or only non-combatant duties. In that case, I suppose most people would rightly and inevitably call such a person a conscientious objector. I have made these observations in order to express my opinion that the phrase "conscientious objector" is not a term of art with any exact meaning, and it depends very much upon the particular circumstances of the case whether or not people call a particular person a conscientious objector.

Sect. 14, under which the regulation in question is made, does not deal with this subject which I have been discussing so far as any express mention of it is concerned. It deals with these objectors only as members of the great class of people who become liable under the Act to perform military service. I have stated very briefly the general effect of sect. 14 (1), but it obviously occurred to Parliament to make some provision for cases in which it would be impossible to reinstate a man in his occupation, "and under conditions not less favourable," where the employer had deliberately taken steps to make it impossible. Therefore, sect. 14 (4) empowers the Minister in a certain event to make regulations for certain purposes:

> If the Minister is satisfied that it is necessary to restrain employers from terminating the employment of their employees by reason of any duties or liabilities which they are or may become liable to perform or discharge by reason of their having been called from their civil employment for service connected with the

> present emergency, or to make provision for the prevention of evasion of the provisions of this section, he may make regulations for those purposes; . . .

The Minister was satisfied that it was necessary "to restrain employers from terminating the employment of their employees" by reason of duties or liabilities, and so forth, to prevent the evasion of the provisions of the section, and accordingly regulations were made with that object. It is one of those regulations which is the foundation of the prosecution which the appellants here say should have succeeded. Regulation 2 provides as follows:

> (1) An employer shall not terminate the employment of any person employed by him—(*a*) by reason of any duties or liabilities which that person is or may become liable to perform or discharge by virtue of the provisions of the Act, or (*b*) in order to evade the obligations imposed by sect. 14 (1) of the Act . . .

If he does this, then, under the regulation, he is liable to a fine.

The first question which arises is whether or not that regulation is *ultra vires* the Act. Counsel for the respondents has told us that the point that the regulation was *ultra vires* was not one of the arguments originally presented to the court by counsel. It was a point raised by the magistrate and then adopted by counsel for the respondents. I hope I am not doing injustice to counsel for the respondents or to his argument when I say that, in this court, it was rather faintly argued by him that the regulation was *ultra vires*. However, we have to deal with the point, and, although there is not very much to be said about it, I have formed a clear opinion upon it. The regulation, it will be observed, almost slavishly follows the language of the section, perhaps a little too slavishly. Apparently the regulation has not been found quite so clear and satisfactory in practice as was desirable, and our attention has been called to an amended or a new form of regulation, which was made with the same object. However, I can see no ground upon which the regulation can properly be said to be *ultra vires* sect. 14 (4). The whole of the regulations by reg. 5 apply only to a case where the employment has been terminated before the date upon which the person liable was called up for service under the Act. Obviously it was thought that, where the dismissal had taken place after a man had been called up, the man was properly protected by sect. 14 (1). The regulation was necessary, however, in order to deal with dismissals before calling up had taken place. The object of the section—it says so in terms—was plainly to stop dismissals which were of a particular character—I shall come to those words later on—and to prevent, as the section says, evasion of the provision of the section for reinstatement. The section forbids dismissals in advance of calling up, if made on certain specific grounds, the grounds being:

> . . . by reason of any duties or liabilities which they [the employees] are or may become liable to perform or discharge by reason of their having been called from their civil employment for service connected with the present emergency.

Reg. 2 (1) (*a*) seems to me in rather briefer form, but sufficiently in accordance with the powers of sect. 14 (4) to carry out the Minister's intention to exercise his power under the Act. I cannot see that

reg. 2 (1) (*a*) in any way goes outside the statutory provisions of subsect. (4). So far as reg. 2 (1) (*b*) is concerned, I do not think that it has been suggested that that is *ultra vires.* It follows almost word for word the language of subsect. (4). All I can say is that the intention of subsect. (4) seems to me to be the same as that of the regulation in question, A
and the regulation does not go beyond that intention, and I hold that it is *intra vires* the Act.

The question then arises as to whether these three cases ought to have been decided so as to lead to a conviction. In other words, was an offence committed against the regulation ? The cases are a little different B
on their facts. In the first case, that of Downsborough, the grocery departmental manager communicated with him and, having asked him whether he was a conscientious objector, received an answer in the affirmative. The board of directors of the society (and this is, of course, common to all three cases) had, previous to the conversation C
between the grocery departmental manager and Downsborough, passed the following resolution :

> Resolved that the contracts of service with the society of conscientious objectors be terminated.

Downsborough received a written notice of dismissal shortly after the D
conversation to which I have referred.

Admittedly Downsborough intended to make it quite clear that he was a conscientious objector, whatever the precise meaning of that phrase might be. He got his name put on the permanent register of conscientious objectors under sect. 5. His case was heard by the local E
tribunal, and his name was removed from the register. The decision of the tribunal was that he should be registered in the military service register as a person liable under the Act to be called up for service, but to be employed only in non-combatant duties. On all these facts, the magistrate came to the conclusion, which he stated as a finding of fact, F
that Downsborough's employment was terminated because he was a conscientious objector.

The case of Wadsworth was slightly different. He again was informed of the decision of the board to dismiss conscientious objectors, and he accepted that decision and ceased working for the society. His case G
had been heard also by the local tribunal after his registration in the register and the tribunal decided that he was not a genuine conscientious objector and ordered his name to be removed from the register without qualification. There, again, the magistrate found as a fact that Wadsworth's employment was terminated because he was a conscientious H
objector.

In the case of Ardron, he was prepared to undertake non-combatant service of a particular character. He had made an abortive effort to join the R.A.M.C. Subsequently, when he applied to the tribunal, it was decided that his name should be removed from the register of conscientious objectors, and that he should be registered on the military service register as a person liable under the Act to be called up for service, but to be employed only in non-combatant duties. That was satisfactory to him and he accepted the decision. However, in pursuance of the resolution passed on July 22 by the board of directors, he also was dismissed. The magistrate has found in this case as a question of fact, in so far as it is a question of fact, and in law, in so far as it is a matter of law, that Ardron was and is a conscientious objector and that his employment with the society was terminated for that reason.

On these facts, I find it impossible to say that the magistrate came to a wrong conclusion when he found that these men were dismissed because they were conscientious objectors. If a man has a gardener—I take this as an ordinary illustration of what might happen—who is liable to become, or intends to become, a fire-fighter, and the employer dismisses him on that ground, that is one case. If, on the other hand, the gardener, being liable, either as an ordinary citizen or because there is a statutory compulsion, becomes a fire-fighter but says that he is not going to fulfil the duties of a fire-fighter and the employer dismisses him on that ground, it would be absurd, in my judgment, to say that the employer dismissed the gardener on account of the duties which the man would have to perform as a fire-fighter. The truth would be exactly the opposite. The gardener in that case would be dismissed, not because of the duties or liabilities of a fire-fighter, but because he declined to perform the duties or to incur the liabilities of a fire-fighter. In this case, therefore, to say that a man discharged because he availed himself of his rights under sect. 5 of the Act was discharged because of the duties and liabilities under which he would have come if he had not availed himself of those rights seems to me an impossible view to accept.

The way in which it was put by counsel for the appellants was that the regulation—accepting, as he does, that it is *intra vires*—forbids the termination of the employment of a person "by reason of any duties or liabilities" which that person "may become liable to perform" by virtue of the provisions of the Act. He says that a person applying under sect. 5 to be treated as a conscientious objector has certain duties which have to be performed, such as applying to the local tribunal and submitting himself for medical examination and, therefore, that it is true to say in that case, on the facts and upon an accurate statement of the law, that a man can be said to be dismissed by reason of duties or liabilities, when the real reason for which he is being discharged is that he has availed himself of a privilege given by sect. 5. I do not think the words "duties or liabilities" in this part of the regulation refer to those duties or liabilities which a man who avails himself of sect. 5 must discharge or bear. I think that the duties or liabilities referred to in the regulations are the same as those referred to in subsect. (4)—namely, the duties and liabilities which a man will undertake, or will have to undertake, when he is called up from his civil employment for service connected with the present emergency, that is to say, military service in some form or another. As the magistrate, in my opinion, has rightly come to the conclusion that these people were dismissed on the ground that they were conscientious objectors, it seems to me impossible to say that he has committed an error in point of law or has misunderstood or misapplied the provisions of the regulation. The fact is that the last thing the employer was doing was to dismiss these men because they were going to perform duties and liabilities of a military character. He was dismissing them because they took advantage of the provisions of the Act to try and avoid the performance of those duties and liabilities.

Although I do not wish for a moment to be understood as expressing any approval of the act of a person who tries to penalise another person for holding opinions, religious or otherwise, there is nothing in the Act of which I am aware to deprive an employer of the right to dismiss a servant on any ground he likes, except the provisions contained in sect. 14 (4). If an employer chooses, before a man is called up, to dismiss him for intemperance, or for dishonesty, or for incompatibility between the employer and the servant, or for any other cause, he may do so, but, if he discharges the man by reason of the duties or liabilities of a military character which the man may be liable to perform, in those circumstances, and in those circumstances alone, an offence is committed.

There is but one other point which remains to be dealt with, so far as my opinion is concerned—namely, that on reg. 3, to which counsel for the appellants referred, which provides as follows:

> In any proceeding for an offence under these regulations, if the court is of the opinion that there is reasonable cause to believe that the duties or liabilities aforesaid caused or contributed to the termination of the employment, . . . the employment shall be deemed to have been terminated by reason of such duties or liabilities. . . .

That is a provision which is favourable, and intended to be favourable, to persons who were dismissed, but I am quite unable to say, at any rate in the absence of any finding by the magistrate, that the facts lead inevitably to the conclusion that the duties or liabilities aforesaid caused or contributed to the termination of the employment, whether the duties or liabilities are looked upon as representing military duties or liabilities or are looked upon as merely the limited class of duties connected with sect. 5. I am of the same opinion as the magistrate, and I do not think that those duties or liabilities within the meaning of the section caused or contributed to the termination of the employment. For these reasons, I think that it is impossible to interfere with the magistrate's decision that no offence has been committed in any of these three cases.

Humphreys, J.: I am of the same opinion, though I would like respectfully to emphasise what has fallen from my Lord as to the extreme undesirability of stating a case in the form in which we find the special case here. The judges of the King's Bench Division have consistently expressed the view that a case should be stated by justices in a particular form. No form is to be found prescribed in the Act. The only requirement, so far as I am aware, is to be found in the old Crown Office Rules, which provide that a case, when stated, is to be divided into paragraphs, which, as nearly as may be, shall be confined to distinct portions of the subject and that every paragraph is to be numbered consecutively. However, the form of case which has been invariably approved by this court, and any distinct variation from which has invariably been condemned by this court, is that which is to be found in DOUGLAS'S SUMMARY JURISDICTION ACT, 10th Edn., p. 313. That is the form in which all special cases of this nature should be stated. I wish to repeat that I hope steps will be taken to bring to the notice of clerks of courts of summary jurisdiction the observations made by my Lord, because they affect, or may affect, them all.

As to the facts of this case, the magistrate appears to have taken a point which, if it is a good one, is one of considerable importance. He held that a regulation of a criminal character, providing penalties for persons who disobey it, was *ultra vires* the statute which conferred the power to make that regulation. For obvious reasons, that must always be a very serious decision. The magistrate, having, as I have said, so far as I can judge, taken the point himself, states what he regards as the relevant point, and concludes as follows:

> After the most careful consideration, I have come to the conclusion, without any doubt whatever, that the National Service (Armed Forces) Prevention of Evasion Regulations, 1939, reg. 2, under which these proceedings are brought, is *ultra vires.*

I can only say that, in my opinion, the magistrate's decision upon that point was the result of entirely misreading the statute which gives power to make that regulation. The magistrate has said:

> It is quite clear in my opinion that the protection provided by sect. 14 (4) of the Act only extends to those who are actually called up.

Therefore, he held that it cannot extend to the persons in this particular case, or, indeed, to any other person who has not actually been called up. When I look at sect. 14 (4), I cannot find anything to justify that view at all. It appears to me to be plainly applicable to persons who are liable to military service, as well as to persons who have actually been called up for military service. It is quite unnecessary to give any lengthy judgment upon the point, since I entirely agree with what my Lord has said. Perhaps the shortest and most effective way of dealing with this point is to say, as my Lord has said, that I can find no reason whatever why I should hold that this regulation, which almost word for word follows the language of the section which gives power to make it, should be held to be *ultra vires.* The magistrate observed, quite truly, that it is not exactly in the same terms as the National Service (Armed Forces) Act, 1939, s. 14. The section provides as follows:

> (4) If the Minister is satisfied that it is necessary to restrain employers from terminating the employment of their employees by reason of any duties or liabilities which they are or may become liable to perform or discharge. . . .

The regulation follows that precisely. Then the section continues as follows:

> . . . by reason of their having been called from their civil employment for service connected with the present emergency . . .

The regulation, however, uses these words:

> . . . by virtue of the provisions of the Act . . . A

I can only say that my attention has not been called to any provisions of the Act which can possibly be referred to in those words except those of sect. 14 (4). It seems to me that all that has been done is to use what to some minds may be a very undesirable thing, a few words, when many might have been employed. For that reason, I agree with B the judgment of my Lord that there is no ground whatever for holding that reg. 2 is *ultra vires*.

The next point deals with the facts of this case. The first observation I wish to make about them is this. The magistrate has, in the case of each of these three persons, found as a fact that the person was dismissed, C or his employment with the society was terminated, because he was a conscientious objector. The magistrate has been careful to say that he held that whether it is a question of law or whether it is a question of fact. It seems to me, however, that one has to make some further inquiry before accepting that, and to ask what is meant by saying that D a person is "dismissed from his employment because he is a conscientious objector." That phrase is not to be found in that form in the Act, although the expressions "conscientious objector" and "conscientious objection" and so forth are to be found, and are dealt with in the Act. What is meant by that phrase? I think that the magistrate himself E has answered that question quite correctly in the course of the case. I am not sure that he has used the right expression when he comes to the end of the case, but I find that, when dealing with the case of Ardron, he observes that on July 22 there was a meeting of the board of directors at which it was resolved "that the contracts of service with the society F of conscientious objectors be terminated." A very few days later, the board was minded to explain exactly what that meant. On July 29, a resolution was passed rescinding the resolution which I have just read and substituting this resolution:

> Resolved that all employees appealing against military service on conscientious G grounds be given one week's notice to terminate their contracts of service with the society.

Upon that, the magistrate observed that the words of that new resolution threw light on the meaning to be attached to the original resolution, and that they meant that the board were unwilling to continue to employ H persons who sought to avoid military service on conscientious grounds during the present emergency. I mention that matter because I would have felt some considerable doubt about the correctness of his finding, whether it be a finding of fact or a finding of law, that these persons were dismissed because they were conscientious objectors without such explanation of the meaning of that term. I myself cannot think that there can be attached to that resolution the meaning that the board intended to terminate the contract of service of everyone in their employ whatever his age might be, who held the conscientious opinion that war was contrary to the law of God. I cannot think that anything of the sort happened, and there is no evidence in the case to suggest that any such steps were taken. I think that the meaning of the resolution was that persons who were of military age, and, therefore, liable to military service, who took advantage, to put it in the shortest possible way, of sect. 5 of the Act were persons whom the company declined to have any longer in their employ.

If that be so, and if that be the reason why these persons have been dismissed, the question arises whether they come within the terms of this regulation, which provides that an employer shall not terminate the employment of any person employed by him for certain reasons, and the reason which is given is as follows:

> . . . by reason of any duties or liabilities which the person is or may become liable to perform or discharge by virtue of the provisions of the Act.

I cannot myself find any liabilities or duties which these persons were liable to perform or to discharge which were the cause of their being dismissed. Accordingly, I entirely agree with the expression of view of my Lord that, if anything, they were dismissed because they did not perform the duties and liabilities which attached to persons of their class and their age and so on, but did their best to get out of them. In saying that, I am not casting any reflection upon the appellants. Indeed, one of them, it is quite clear, was most anxious to serve his country, and asked only that he might be put in the medical side of the Army, and he has, apparently, got something very much of what he desired.

However, that is the view which I take of the matter. That disposes of this prosecution, because it is clear that the prosecution had to show that it was because of some duties or liabilities arising from this Act that these persons were discharged. I am only repeating myself in saying that, in my view, they were not discharged because of liabilities imposed upon them, but because—though it may be put in one of several ways—they did not agree to perform these duties or liabilities, or, as the magistrate has put it, they took advantage of their being conscientious objectors to try to escape the liability for military service. On that ground, I agree with the magistrate, at all events in the result at which he arrived, and I think that this appeal should be dismissed.

LEWIS, J.: I agree. These cases, on which special cases have been submitted for our opinion, were heard by the magistrate in Oct., 1940. Two questions have been argued before us. The first is that the National Service (Armed Forces) Prevention of Evasion Regulations, 1939, reg. 2 (1) (*a*) was *ultra vires.* I confess that I have considerable difficulty in following the reasoning of the magistrate when he arrived at the conclusion that the regulation was *ultra vires.* For that reason, I am reluctant to say anything more, lest I should appear to be doing him an injustice. However, I have considered the Act and the regulation, and I have listened to the argument which has been put before this court. It is sufficient for me to say that I entirely agree with the words which have fallen from VISCOUNT CALDECOTE, L.C.J., and HUMPHREYS, J., and I see no ground for holding that the regulation which has been attacked is in fact *ultra vires*.

The second matter which was argued was, as counsel for the appellants put it, whether there was evidence to support a conviction on these informations. The informations were informations in which it was alleged that the respondents to this appeal, being employers, did terminate the employment of a person employed by them, namely, the said Arnold Downsborough (I am reading from the case stated in Downsborough's case):

> . . . by reason of duties or liabilities which he was or might have become liable to perform and discharge by virtue of the provisions of the National Service (Armed Forces) Act, 1939.

It seems to me necessary—subject to the terms of reg. 3, to which the attention of the magistrate was not drawn—for the prosecution to prove that the dismissal of the men concerned and the terminating of their employment was by reason of duties or liabilities which they had, or might have, become liable to perform and discharge by virtue of the provisions of the Act. As I read the decision of the magistrate, it is tantamount to saying that, on the facts as found, he is not satisfied that the appellants in this court had met the onus of proving that the reason for terminating their employment was that they had been, or might be, called upon to perform or discharge duties by virtue of the provisions of this Act. I can see nothing in this Act which interferes with the employer's right of giving the proper notice of termination of the employment to any employee other than the reason specified in sect. 14 (4) and the regulations made thereunder. As has been pointed out in the course of the argument by HUMPHREYS, J., sect. 14 (1) does not impose a penalty on a person who terminates the employment. It merely provides that anybody who has been in a man's employment must, under the Act, have his place kept open for him on his return. As far as I am aware, there is no law which prevents an employer from giving proper notice to an employee. Whatever the ethics of the matter may be, on which it is not for me to express any opinion, there is nothing to prevent an employer from dismissing a man because he holds certain political, religious, or, it may be, for the time being unpopular, opinions. That any man should be victimised for holding certain religious, or political, or unpopular opinions may be considered reprehensible from any and every point of view other than the legal one, but this court has not to go into matters of that sort. It appears to me that the only interference, if I may put it in that way, with the liberty of an employer to dismiss a man arises if he dismisses him under the terms of sect. 14 (4):

> . . . by reason of any duties or liabilities which they are or may become liable to

perform or discharge by reason of their having been called from their civil employment for service connected with the present emergency . . .

I am satisfied in this case that the employment of these three men was terminated because, as the magistrate has stated, they were conscientious objectors. The expression or label " conscientious objectors " was not A a creation of this Act of Parliament. It was an expression in general use to describe persons who held certain views long before Sept. 3, 1939, the date of the coming into force of this Act. My interpretation of the first resolution of the respondent society and of the conversations which took place with each of the appellants is that the men were dismissed B because they were conscientious objectors within the ordinary everyday meaning, which had become common parlance, of that expression. Even if the term " conscientious objector " means one who is ostensibly qualified to be so called by reason of his having taken advantage of the privileges afforded to a conscientious objector by sect. 5 of the C Act, it seems to me to make little or no difference. It may very well be that the second resolution, which was passed in this case after the men had been dismissed, was explanatory of what the board meant by their original resolution. Nevertheless, however that may be, I am satisfied that it is impossible in this case to say that the magistrate D was wrong in coming to the conclusion that the respondents terminated the employment of these men for some reason other than that of any duties or liabilities which they were, or were likely to be, liable to perform or discharge under the Act. I think that the converse is true, and that these men were dismissed because they had sought to evade the duties E and liabilities which were imposed upon them under the Act. Therefore, in my view, this appeal does not succeed.

I do not want to add anything to what has already been said with regard to the form in which this case has been stated. For my own part, I have no doubt that the magistrate stated the case in the way he did F with the best possible intentions, and with an earnest desire to assist the court. I entirely indorse the view of HUMPHREYS, J., that it is a very great pity that he did so, because, so far from assisting the court and making it clear, he has, by annexing to the case an appendix containing his long judgment, in which of necessity questions of fact are G intermingled with questions of law, added to the labours of the court in discovering exactly the facts found and his opinions on the law. However, I am quite satisfied that, having found as a fact, on which there was evidence that he could so find, that these men were dismissed because they were conscientious objectors, he was right in saying that the informations had failed. H

Appeal dismissed.

Solicitors : *Alfred Messer & Co.*, Leeds (for the appellants) ; *Haslewood, Hare & Co.*, agents for *Aston, Harwood & Co.*, Manchester (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

JOHNSTONE *v.* SWAN ESTATES, LTD.

[CHANCERY DIVISION (Morton, J.), **November 17, 18, 1941.**]

Landlord and Tenant—Option to determine on premises becoming unfit—Service flat—Premises becoming unfit—No damage to flat—Damage to building rendering services impossible—Landlord and Tenant (*War Damage*) *Act,* 1939 (*c.* 72), *s.* 1.

A lease of a flat provided that, if the flat or other parts of the block of flats should be destroyed or damaged by any means not arising by the act or default of the tenant so as to render the flat unfit for occupation, the lease might be terminated at the option of either party. The block of flats was damaged by enemy action, and, though the plaintiff's flat was not physically injured, essential services, such as heating, lighting and the lift, which the landlords had covenanted to provide, were completely interrupted. The plaintiff served a notice of disclaimer on the landlords under the Landlord and Tenant (War Damage) Act, 1939, s. 4 (2) (*a*), which the landlords refused to accept. The plaintiff, in the exercise of his power under the above-mentioned provision of the lease, then gave notice determining the lease. The landlords contended that the plaintiff was not entitled to exercise this option on the grounds (i) that war damage did not come within its provisions, (ii) that the flat was not rendered unfit for occupation, (iii) that on the true construction of the Landlord and Tenant (War Damage) Act, 1939, s. 1, particularly subsect. (4) thereof, the plaintiff was not entitled to exercise his power to determine the lease as the right to do so was a right "arising out of the non-fulfilment of an obligation to repair" within the meaning of that section, and (iv) that on service of a notice of disclaimer the plaintiff was precluded from exercising his option under the lease :—

HELD : (i) the plaintiff was entitled to exercise his option to determine the lease, since the events which would give rise to its exercise included unfitness for occupation by reason of war damage.

(ii) having regard to the terms of the lease as a whole, the interruption of the services was such as to render the flat unfit for occupation.

(iii) the right to exercise the option to determine the lease was independent of any obligation to repair. Therefore the Landlord and Tenant (War Damage) Act, 1939, s. 1 did not affect its exercise.

(iv) the plaintiff's notice of disclaimer did not prevent him from exercising his option to determine the lease.

[**EDITORIAL NOTE.** The clause in the lease here considered is not so often included in leases as might be expected. In long leases all the obligations of keeping the premises in repair and fit for habitation are generally placed upon the tenant and there is no reason for the inclusion of such a clause since, such obligations are absolute. In leases of short terms, the parties usually require as simple a document as possible and clauses of this nature are often omitted. The usefulness of such a clause is here made so evident that there is no doubt that, in future, except possibly in the case of ground leases, it will seldom be omitted. It will be noted that in this particular case the clause extended to damage to other parts of the building than the demised premises, and the necessity for this provision in the case of a flat is emphasised by the facts of this case. In the case of a service flat, damage to a remote part of the building in which the flat is situate may render it useless to the tenant and it is necessary that, in that event, he should have power to determine the tenancy, or, at any rate, cease to be liable for the rent. The most important argument advanced in this case on behalf of the landlord was that the option to determine had ceased to be exercisable as a result of the passing of the Landlord and Tenant (War Damage) Act, 1939, s. 1. It was contended that this enactment was a statutory modification of all private rights arising out of war damage, but it is held that the section did not affect the option to determine, because that option was independent of any obligation on the landlord to repair.

AS TO OPTION TO DETERMINE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 69-71, paras. 77-79 ; and FOR CASES, see DIGEST, Vol. 31, pp. 535-540, Nos. 6805-6847.]

Case referred to :

(1) *Cooper* v. *Jax Stores, Ltd.*, [1941] 1 K.B. 577 ; [1941] 1 All E.R. 502 ; Digest Supp.

SUMMONS to determine whether an option to terminate a lease contained in cl. 6 thereof had been validly exercised. The facts are fully set out in the judgment.

S. Pascoe Hayward for the applicant.

Lindsay M. Jopling for the respondents.

MORTON, J. : On July 22, 1938, Gerald Ewart Johnstone took a lease of a flat on the eighth floor, No. 144, Swan Court, Manor Street, Chelsea. The lease was made between Swan Estates, Ltd., the lessors, of the one part, and Johnstone, the lessee, of the other part, and the only recital is as follows :

> Whereas the lessors being estate owners of the building (hereinafter called the mansion) known as Swan Court Manor Street in the Borough of Chelsea in the county of London are desirous of letting parts thereof in flats for private residences and intend that the flats so let shall be subject to regulations to be made from time to time by the lessors for the management of the mansion and the conveniences to be afforded to the tenants and otherwise and pursuant to that intention the lessors have already made the regulations a copy whereof is contained in the first schedule hereto.

So far as material, the operative part is as follows :

> In consideration of the rents and covenants on the part of the lessee hereinafter reserved and contained the lessors hereby demise to the lessee all those several rooms bathrooms and servants' offices known as Flat No. 144 on the eighth floor of the mansion (which flat is hereinafter referred to as the flat) together with the use in common with the lessors and their other lessees of the entrance halls staircases lifts and passages leading to the flat and also of the gas and water pipes and electric wires in the mansion for services of the flat except and reserving to the lessors and their other lessees the free and uninterrupted passage of gas water and electricity through the pipes and wires which now are or may at any time hereafter be in on or passing through the flat . . .

Then follow certain powers reserved to the lessors, which I need not read. The habendum is as follows :

> . . . unto the lessee from Sept. 29, 1938, for the term of seven years (determinable as hereinafter mentioned) subject to the burden of the covenants or agreements already entered into by the lessors with the lessee of any other flat in the mansion for the observance of the said regulations and subject also to the rights and easements appertaining to any property adjacent to the mansion and to the alteration or rebuilding of such adjacent property in manner hereinafter appearing.

The rent is £200 per annum, to be paid without any deduction except for landlord's property tax in equal quarterly payments in advance on the four usual quarter days, and there is a provision for additional rent in certain events which I need not specify.

Clause 2 contains covenants by the tenant with the landlords. The first is that the tenant will pay the rent, and the second and third are in these words :

> (2) That the lessee will pay all charges in respect of gas and electricity used in the flat and in respect of the maintenance and repair of the Electrolux refrigerator which is a landlord's fixture. (3) That the lessee will from time to time and at all times during the term hereby granted well and substantially repair cleanse maintain amend and keep the inside of the flat and the landlord's fixtures therein (unless the same shall be destroyed or damaged by fire) and in particular will as occasion

> requires clean all windows all cisterns boilers and water pipes and keep all ball cocks water pipes gas pipes and electric wires and tubes in the flat in good order and condition and will immediately replace all broken windows.

I do not think that I need read the rest of that covenant, nor need I read any of the other covenants which are contained in cl. 2. Clause 3 of the lease is as follows :

> The lessee hereby further covenants with the lessors that the lessee will at all times during the term hereby granted observe the regulations from time to time governing the flats in the mansion for the time being let as private residences a copy of which regulations as at present in force is contained in the first schedule hereto.

The first schedule contains 17 regulations, of which I think I need read only two. The first regulation is as follows :

> . . . will use and occupy the flat as a private residence only and for no other purpose and in particular will not permit any sale by auction or any meeting for any religious political or other purpose to be held therein and will not occupy the flat or any part thereof in such a manner as shall be injurious to health whether by overcrowding or otherwise.

The twelfth regulation is as follows :

> . . . will not permit coal or coke to be delivered at the flat.

In cl. 4 are contained the landlords' covenants. First of all there is the usual covenant for quiet enjoyment. Then there follows by sub-clause (2) a covenant in these words :

> That the lessors will during the said term pay all existing and future rates taxes charges assessments impositions and outgoings whatsoever (whether parliamentary parochial or local) for the time being payable in respect of the flat as part of the mansion or otherwise except for gas and electricity used in the flat and for maintenance and repair of the Electrolux refrigerator as aforesaid but including water rates.

Sub-clause (3) is a covenant as to the repair of the main walls, chimneys, roof, drains and exterior of the mansion and other repairs which are to be done by the landlords. Sub-clause (4) is in these words :

> That the lessors will provide and maintain a proper supply of hot and cold water to the flat the hot water being heated between the hours of 7 a.m. and 11 p.m. but the lessors shall not be liable to the lessee for any failure in the supply of water howsoever caused but in the event of any such failure the lessors will with all reasonable despatch do such repairs as may be requisite for the restoration provision and maintenance of such supply.

It is to be observed that, although there is a covenant there to maintain a proper supply of hot and cold water, the landlords are to be free from any liability for failing to provide such a supply if they do with reasonable despatch such repairs as may be requisite to restore, provide and maintain the supply. Sub-clause (5) is as follows :

> That the lessors will supply and maintain from Oct. 1 in each year to Apr. 1 in each year between the hours of 7 a.m. and 11 p.m. in each day of the said period a supply of hot water or steam to the radiators of the flat in order to heat the flat . . .

Then follows a provision as to the landlords not being liable for any failure in the supply similar to that which I have already read from sub-clause (4). Sub-clause (6) is as follows :

> That the lessors will keep servants who shall at the expense of the lessors perform the services specified in the second schedule hereto.

The second schedule deals with such matters as cleansing the entrance hall and lifts, removing dust bins, attending to the lighting of the entrance hall, staircases and lifts, and attending to the lifts and luggage.

I now come to cl. 6, on the construction of which the first point to be decided arises, although, of course, that clause must be read in conjunction with the rest of the document in order to ascertain its true meaning. It is in the following terms :

> If the flat or other parts of the mansion shall be destroyed or damaged by any means not arising by the act or default of the lessee or any person being a servant of the lessee or being in the flat with his express or implied permission so as to render the flat unfit for occupation this present lease may be terminated at the option of either the lessors or the lessee (notice of such option to be served on the other of them in writing within three months from such destruction or damage) and thereupon this lease and everything herein contained shall be void as from the date of such destruction or damage without prejudice to any claim by either party against the other in respect of any antecedent breach of covenant and the right of the lessors to the respective rents hereby reserved up to such date.

Clause 7 contains a proviso giving the tenant liberty to determine the lease at the expiration of the first, third or fifth year of the term if he gives the landlords six months' previous notice in writing of his intention, and if he pays the rent and performs his covenants up to the date of the determination. There is nothing else in the lease which is material for the present purpose.

On Sept. 9, 1940, certain portions of the mansion (the term used in the lease) were destroyed or damaged by enemy action. The plaintiff's flat was not itself physically injured, but all the services to the flat were completely interrupted and cut off. On Sept. 10, 1940, Messrs. Harrods, Ltd., as agents for Johnstone, wrote to the agents of the landlords as follows :

> *Re* Flats at 128, 144, Swan Court, Chelsea.
>
> During yesterday's air raid the above flats were damaged and apparently rendered unfit for habitation, and on behalf of our clients, Arthur Fitzroy Dobbie Bateman of No. 128, Swan Court, and G. E. Johnstone of 144, Swan Court, we herewith give you notice under the Landlord and Tenant (War Damage) Act, 1939, s. 4 (2) (*a*), to disclaim the lease, and we shall be glad if you will kindly acknowledge.

In reply to that letter, Messrs. Allsop & Co. wrote as follows :

> Replying to your letter of the 10th inst., in view of the fact that both these flats have been passed by the authorities as fit for habitation we cannot accept on behalf of our clients, the owners of this building, your notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939, s. 4 (2) (*a*).

I think that the natural conclusion which the party receiving such a letter would draw would be that the landlords intended to make an application to the court under sect. 6 of the Act to determine whether the notice was of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice was served.

On Sept. 20, 1940, the agents for the landlords sent what appears to be a circular letter to the tenants. It begins "Dear Sir or Madame," and it is headed, "Swan Court, Chelsea," and is as follows :

> We regret to inform you that your landlords, Swan Estates, Ltd., are placed in considerable difficulty owing to the damage which was caused to Swan Court by the recent aerial bombardment. It has been necessary for them to communicate with various persons interested in the building and it is hoped that the result of their negotiations will be that steps will be taken forthwith to repair the whole of the damage. The south block (i.e. the odd numbers) has already been put into a complete state of repair and all services, including lifts, central heating and hot water are available. With regard to the north block [in which the plaintiff's flat was situate], certain repairs have already been carried out and we hope the remainder will be executed at an early date. You will appreciate, however, that owing to

> the shortage of labour and materials the company are working under great difficulties and there must be some slight unavoidable delay.

Johnstone, having seen the letters to which I have referred, on Sept. 27, 1940, wrote personally to the landlords as follows :

> I am in receipt of your letter of Sept. 20 with reference to the above premises, from which I note that it will be some time before the north block is fit for habitation again. In the meantime I have taken the opinion of an independent surveyor, and also of my solicitors, and as the result of their advice I am now writing to determine my lease of No. 144 Swan Court under cl. 6 of the lease. I cannot apprehend that, having regard to the admitted condition of the north block my right to take this step can be questioned, but as a formality, and in order to obviate the necessity of doing so in the future should any dispute arise, I should also like formally to give notice of my intention to determine the present lease at the expiration of the third year of the term, i.e. on Sept. 29, 1941.

On Sept. 30, two letters were written by the agents for the landlords. One of them was in reply to Johnstone's letter, and was in the following terms :

> We thank you for your letter of the 27th inst. We have already received from Messrs. Harrods notice of disclaimer of your lease of the above premises and we have, in turn, served them with counter-notice on behalf of our clients to avoid disclaimer. The owners are taking all reasonable steps to carry out the repairs necessary to this flat. We are informed that war damage is excluded from cl. 6 of the lease and regret we cannot accept your notice under that clause. We do, however, acknowledge the notice to terminate at Sept. 29, 1941, which notice is in order.

The counter-notice to Messrs. Harrods, Ltd., to avoid disclaimer referred to in that letter is also dated Sept. 30, and is in the following terms :

> We thank you for your letter of the 10th inst. In accordance with the Landlord and Tenant (War Damage) Act, 1939, s. 4 (5), on behalf of Swan Estates, Ltd., whose registered office is at 52, Cornhill, E.C.3., we hereby give you notice to avoid disclaimer of the lease which your client, G. Johnstone, Esq., holds of this flat for a term of 3, 5 or 7 years from Sept. 29, 1938, and require him to retain such lease in accordance with the terms specified in the above-mentioned Act.

There followed certain correspondence, and on Oct. 24 the keys of the flat were handed over by Messrs. Harrods, Ltd. I need not read the correspondence which followed, but it is to be noted that throughout the point taken by the landlords and their advisers was that cl. 6 of the lease did not apply to war damage, and in the last letter which is before me, dated Jan. 14, 1941, Messrs. Markby, Stewart & Wadesons, the solicitors to the landlords, say :

> . . . our clients take the view that cl. 6 of the lease does not apply to war damage, and we are prepared to test this matter by issuing proceedings against your clients which we have threatened to do unless the matter is dealt with and payment [of the rent which was being claimed by the landlords] made at once.

In these circumstances, on Jan. 28, 1941, Johnstone took out the summons which is now before me and which has been amended, by leave, in certain respects.

The facts are agreed to be as stated in the affidavits filed in support of the summons, and there is no dispute of fact to be determined. The evidence on behalf of the defendants is an affidavit by one Senior, a Fellow of the Auctioneers' Institute and a partner in the firm of Messrs. Allsop & Co., chartered surveyors, auctioneers, valuers and estate agents. Senior states as follows :

> (2) On Sept. 8, 1940, the north block of the building was struck by a bomb and about twelve of the outside flats were rendered totally uninhabitable. It was also necessary to carry out repairs in about another twenty of the flats. The flat

> No. 144 demised by the above-mentioned lease was not damaged in any way and no repairs have been carried out at all, nor are they in fact necessary. (3) Certain of the services in the building such as the lift, hot water, electric light and gas were damaged. All such damage has now been repaired: and the services are now available. (4) The dates on which the various services became available are as follows . . .

Then he gives the dates for the lift, the hot water, the electric light and the gas, and in every case it is Nov. 20, 1940. He goes on to say that on Mar. 18, 1941, he again visited flat No. 144:

> Not a pane of glass has been broken and there is no sign that the bomb had any effect whatever on this flat, and the flat remains in the same state as it did when the plaintiff removed his goods and chattels therefrom.

In answer to that affidavit, Johnstone filed an affidavit on Oct. 16, 1941, in which he says:

> (2) Referring particularly to para. 3 [of Senior's affidavit], the services therein mentioned were completely interrupted as were also the telephone and central heating. It was impossible to use the passenger lift; servants' lift; central heating; hot water supplies; electric supplies; the telephone; and the refrigerator. (3) In consequence of this no cooking could be done at the flat [the cooking apparatus was an electric stove, and there were no alternative facilities] nor could any light or heat be obtained after Sept. 9, 1940. (4) The sitting-room was heated by an electric fire and in addition both it and the bedroom were heated with hot water pipes, part of the central-heating installation. Both these means of heating were rendered inoperative as from Sept. 9. (5) All supplies of hot water in the kitchen and in the bathroom were inoperative and accordingly from Sept. 9 to Nov. 20, 1940 (taking the latter date from the said affidavit of the said Herbert Ernest Senior) the flat was totally without heat or artificial light of any kind; without cooking facilities; without hot water; or the means of heating water.

The originating summons, as it now stands, asks:

> (1) That it may be determined whether upon the proper construction of cl. 6 of the said lease the plaintiff is entitled to exercise the option to determine the said lease mentioned in the said clause in the event of the flat comprised in the said lease or other parts of the mansion therein mentioned having suffered war damage (that is, damage caused by, or in repelling, enemy action) so as to render the said flat unfit for occupation.

That raises the question, putting it shortly, whether war damage comes within the provisions of cl. 6 of the lease. Para. (2) of the summons asks:

> . . . whether the said flat or other parts of the said mansion was or were on or about Sept. 9 or Sept. 10, 1940, destroyed or damaged so as to render the said flat unfit for occupation within the meaning of the said cl. 6.

That is a question of fact which is not ordinarily determined upon an originating summons, but, as the facts are agreed, what it comes to is that I have to decide whether on these agreed facts, the flat was rendered unfit for occupation on Sept. 9, 1940, within the meaning of cl. 6 of the lease. Paras. (3) and (4) ask:

> (3) . . . whether a notice dated Sept. 27, 1940, served upon the defendants by the plaintiff was effective to render the said lease void notwithstanding the service of a notice of disclaimer dated Sept. 10, 1940, served by the plaintiff on the defendants pursuant to the Landlord and Tenant (War Damage) Act, 1939, s. 4 (2) (*a*). (4) . . . whether in the events which have happened the plaintiff has validly determined the said lease as from Sept. 9 or Sept. 10, 1940, pursuant to the said option.

I propose first to consider the contractual rights of Johnstone in the events which have happened, apart from the provisions of the Landlord and Tenant (War Damage) Act, 1939, and any notices served thereunder. On this footing, I have no doubt that Johnstone was entitled to terminate the lease, and did so terminate it, by the notice given on Sept. 27, 1940. In arriving at a conclusion on this aspect of the case, the first question

I have to consider is whether on Sept. 9, 1940, the flat was, or other parts of the mansion were, destroyed or damaged by any means not arising by the act or default of the tenant or any person being a servant of the tenant or being in the flat with his express or implied permission. To this question I apprehend that there can be only one answer. That answer is: "Yes. Other parts of the mansion were so destroyed or damaged." No one could contend that the destruction or damage arose from the act or default of the tenant or any servant or licensee of his. It arose by enemy action. Secondly, did such destruction or damage to other parts of the mansion render Johnstone's flat unfit for occupation ? There was no physical damage to flat No. 144 itself, but, as a result of the damage to other parts of the mansion, from Sept. 9, 1940, to Nov. 20, 1940, the state of affairs was as stated in paras. (2) to (5) of Johnstone's affidavit, which I have already read. Johnstone's flat was totally without heat or artificial light of any kind, without cooking facilities, and without hot water or the means of heating water, and, as I have pointed out, Johnstone was precluded by a covenant in the lease from permitting coal or coke to be delivered at the flat, even if (which does not appear from the evidence) there was any fireplace which could have received such coal or coke. Further, Johnstone, who lived on the eighth floor of the building, was unable to use the lift. This state of affairs had lasted for 18 days when Johnstone gave his notice under cl. 6.

I cannot think that, on a reasonable interpretation of cl. 6, the flat was otherwise than unfit for occupation. The meaning in these words in cl. 6 must be considered in relation to the subject-matter of the demise. This was a demise of a residential flat which was to be used, as appears from the recital and from the tenant's covenants, as a private residence only. There are elaborate regulations to maintain the character of this block of flats, and there is a covenant by Johnstone to observe all those regulations. The covenants by the landlords, which I have already read, in regard to maintaining a hot-water supply and hot water or steam to the radiators and the covenants by the tenant in regard to the gas and electricity, the Electrolux refrigerator and the gas pipes and electric wires all indicate that the parties attached importance to these services being maintained in working order. Having regard to the terms of the lease as a whole and to the subject-matter of the demise, I have no doubt that the flat was not fit for occupation within the meaning of cl. 6. It is true that life was not altogether impossible. As was pointed out in the course of the argument, Johnstone might have brought in a stove for cooking purposes, and, I suppose, might have procured candles to light the flat if he were able to buy them, or an oil lamp if he were able to buy it. However, that was certainly not the kind of occupation which the parties contemplated. There is this further point, which is not without importance. The reference to other parts of the mansion being destroyed or damaged so as to render this particular flat unfit for occupation indicates, to my mind, that the parties had in contemplation the kind of event which in fact happened —namely, the cutting off of the services to Johnstone's flat by reason of damage to another part of the building.

It is worthy of note, though it does not affect my decision in any way, that throughout the correspondence, apart from the first letter to which I have referred, the controversy was not whether the flat was unfit for occupation, but was whether war damage was within the terms of cl. 6 of the lease. The notice which was ultimately served to avoid disclaimer amounts, in effect, to a recognition that the premises were unfit, as this notice has the result that there shall be implied in the lease a covenant by the landlord to the tenant that the land comprised in the lease shall be rendered fit so soon as is reasonably practicable after the service of the notice to avoid disclaimer.

Counsel for the landlords relies upon three points to defeat Johnstone's claim that his lease has been validly determined. In the first place, he submits that the flat was not rendered unfit for occupation within the meaning of cl. 6. I do not think that I need deal further with that matter, as I have already dealt with it fully. Secondly, he contends that, on the true construction of the Landlord and Tenant (War Damage) Act, 1939, and in particular of sect. 1 of that Act, the tenant is not entitled to determine the lease under cl. 6. Sect. 1 of the Act, so far as material, provides as follows:

> (1) Where, by virtue of the provisions (whether express or implied) of a disposition or of any contract collateral thereto, an obligation (in this part of this Act referred to as an "obligation to repair") is imposed on any person to do any repairs in relation to the land comprised in the disposition, those provisions shall be construed as not extending to the imposition of any liability on that person to make good any war damage occurring to the land so comprised.

That subsection, it is to be observed, is limited to provisions imposing an obligation on any person to do any repairs. The section continues as follows:

> (2) Where war damage occurs to land comprised in a disposition, then, in so far as compliance with an obligation to repair, as modified by the provisions of the preceding subsection, is, having regard to the extent of the war damage (*a*) impracticable, or only practicable at a cost which is unreasonable in view of all the circumstances; or (*b*) of no substantial advantage to the person who, but for the provisions of this subsection, would be entitled to the benefit of the obligation; the obligation shall be suspended until the war damage is made good to such an extent that compliance with the obligation is practicable at a reasonable cost and is of substantial advantage to the person entitled to the benefit thereof. (3) Any disposition or contract collateral thereto containing a provision whereunder an obligation to make good war damage as such is imposed on any person shall have effect as if that provision were not contained therein.

Then subsect. (4), which is the subsection on which counsel for the respondents particularly relies, provides as follows:

> Where, under the foregoing provisions of this section, an obligation to repair is modified or suspended or an obligation to make good war damage as such is extinguished, all rights and remedies (whether by way of damages, forfeiture, re-entry, sale, foreclosure or otherwise) arising out of the non-fulfilment of the obligation, including all rights against any person who has guaranteed the fulfilment of the obligation, shall be modified or suspended or extinguished accordingly.

Counsel for the respondents contends that, by the reference in the parcels to gas and water pipes and electric wires, coupled with the covenant in cl. 4 (4), (5), of the lease, an obligation is imposed on the landlords to maintain the services in question, and he says that the right conferred on the tenant by cl. 6 of the lease is a right "arising out of the non-fulfilment of an obligation to repair" within the meaning of sect. 1 A of the Act. He submitted that the scheme of the Act was to substitute the arrangements set out in the Act for all private contracts in the event of war damage, and he referred me to certain authorities as to the construction put on certain portions of this Act and as to the general interpretation of statutes. In my view, there is a short but sufficient answer B to his argument. I think that the right conferred on the tenant by cl. 6 of the lease is not a right arising out of the non-fulfilment of a landlord's obligation to repair. It is a right, independent of any obligation, which arises by reason of the enemy having dropped a bomb on another part of the building and damaged it. It is a right which arises because C another part of the mansion has been destroyed or damaged by means not arising from an act or default of the tenant, his servants or licensees, so as to render the flat unfit for occupation. Although I think that this is a complete answer to the argument of counsel for the respondents, it is to be observed further that the covenants by the landlords contained D in cl. 4 (4), (5), are qualified in the manner which I have indicated. If the landlords, for example, fail to supply hot and cold water to the flat, or hot water and steam to the radiators, they are not liable for that failure. They are only under an obligation to do the necessary repairs within a reasonable period. I may add that, as sect. 1 (4) of the Act E affects contractual rights, I do not think that it is legitimate to give it a wide construction, and to give it the construction for which counsel for the respondents contends would be to give it a wider meaning than the words of the subsection justify.

The third point of counsel for the respondents is that the tenant, by F serving a notice to disclaim on Sept. 10, 1940, has prevented himself from determining the lease under cl. 6, and he suggested that, if the tenant were allowed to do so, he would be approbating and reprobating at the same time. On this part of his argument, he referred me to *Cooper* v. *Jax Stores, Ltd.* (1). The decision of that case, as summarised G in the headnote, was as follows:

> Where a notice of disclaimer of a lease has been served under the Landlord and Tenant (War Damage) Act, 1939, on the landlord by the tenant on the ground of war damage to the premises and the landlord serves on the tenant a notice to avoid disclaimer and also of his intention to apply to the court for an order under sect. 11 (1) (c) of the statute directing that, as the premises were capable of beneficial occupation, rent should be payable by the tenants in respect thereof, the landlord H cannot thereafter apply to the court under sect. 6 (1) of the Act for a determination that the notice of disclaimer was of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice of disclaimer was served.

In that case, as SIR WILFRID GREENE, M.R., pointed out, at p. 581 ([1941] 1 All E.R., at p. 505), the landlord would be approbating and reprobating. In my view, however, the decision in that case has really no application to the present case. In the present case, the tenant first of all served a notice of disclaimer on Sept. 10. The landlord's response to that on Sept. 17 was: "We cannot accept, on behalf of our clients, your notice of disclaimer, because the flat has been passed as fit for habitation." On that, and on receiving the further letter of Sept. 20 to which I have referred, Johnstone not unnaturally did not desire, I suppose, to embark on an argument as to whether or not the flat was "unfit" for habitation within the meaning of sect. 4 of the Act, and he served his notice under cl. 6 of the lease. In each case, the object of his notice was to put an end to the lease. Moreover, I cannot find that there is any estoppel raised by his acts. It does not seem to me that there was any representation on the faith of which the landlords altered their position. For these reasons, I must reject the third argument of counsel for the respondents also.

The result is that I shall answer all the questions of the summons in the affirmative. I think that the date should be Sept. 9, because the evidence is that the damage occurred on that date.

Costs to be paid by the respondents.

Solicitors: *Ranger, Burton & Frost* (for the applicant); *Markby, Stewart & Wadesons* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

PRITCHARD-JONES *v.* LE VAYE.

[COURT OF APPEAL (Lord Greene, M.R., and Clauson and du Parcq, L.JJ.), **November 5, 1941.**]

Emergency Legislation—Mortgage—Appointment of receiver—Mortgaged property producing sufficient rent to provide for mortgage interest—Court under no duty to secure equality among secured creditors—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1.

The appellant owned several properties, all of which were subject to mortgages. In two instances the rents exceeded the outgoings on the property, including mortgage interest, and the respondent was mortgagee of one of these properties. In regard to the remaining properties the rents did not cover the outgoings. The respondent applied under the Courts (Emergency Powers) Act, 1939, for leave to appoint a receiver of the property of which he was the mortgagee. The appellant contended that, as the purpose of the Act was to secure an equitable distribution of a debtor's property, leave ought to be refused, in order that the rents of the property of which the respondent was mortgagee would be available for the purpose of equalising the situation as between the respondent and the other mortgagees:—

HELD: the debts being secured debts, the court was not concerned to equalise the position of a creditor who had taken a good security and that of a creditor with a worse one. In the circumstances, leave to proceed ought to be granted.

[**EDITORIAL NOTE.** The provisions of the Courts (Emergency Powers) Act, 1939, are directed primarily to the relief of the debtor, and are not intended to benefit the general body of creditors. In exercising its discretion to grant leave to proceed, the court is not exercising a bankruptcy jurisdiction, in which the main consideration would be the equitable distribution of the debtor's assets among the creditors, but is exercising a jurisdiction to protect the debtor from misfortunes brought about by the war. More recently, in the Liabilities (War-Time) Adjustment Act, 1941, the legislature has provided for an adjustment and settlement in a more comprehensive fashion of the financial affairs of persons affected by war circumstances in the nature of this equitable distribution of the debtor's assets. In the present case, however, the question concerns only the jurisdiction under the 1939 Act. Where the only creditors are unsecured creditors, allowing one of them to proceed to execution will generally give that one some sort of priority over the remainder, but the position is fundamentally different where all the creditors are secured creditors. Here such differences as exist are principally due to the fact that one creditor has obtained a better security than the others, and there is no reason why that creditor should be deprived of the advantages which his wisdom in obtaining that better security when making his bargain with the debtor has given him. The decision here is, of course, limited to the case where all, or practically all, of the creditors are secured creditors.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946. See also BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Statutes Volume, p. 206.]

Appeal by the respondent from an order of Simonds, J., dated July 3, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

W. Summerfield for the appellant.

W. F. Waite for the respondent.

Lord Greene, M.R.: The appellant is the owner of certain properties, all of which are mortgaged. The evidence shows that those properties are the only property which she possesses except for a sum of cash in the bank. Certain of the liabilities are referred to in the evidence. The application under which the appeal arises was made by the mortgagee of one of these properties, and the rents of that property are more than sufficient to discharge the outgoings upon it, including the mortgage interest. We are informed that one of the other mortgagees is in a similar position, but, in regard to the remaining mortgages, the rents are insufficient. An affidavit was put in by the appellant, and one was also put in by her husband. I do not propose to consider whether these affidavits set out the position of the appellant with sufficient particularity. They have been supplemented, to a certain extent, by statements made by counsel, and one statement of importance which he made was that the result of allowing the appeal would be that the rents of the property mortgaged to the respondent would, in the hands of the appellant, be applied for the benefit of other mortgagees. The application was for leave to the mortgagee to proceed to appoint a receiver, and Simonds, J., made an order giving leave to proceed. That order was prefaced by an undertaking by the applicant not to apply towards capital without leave of the judge any moneys received by any receiver appointed by him by virtue of the order. It is said by the appellant that the judge has in some way misconceived the scope of the Court (Emergency Powers) Act, 1939, in reference to the present case. It was argued that the purpose of the

Act was to secure the distribution of a debtor's property amongst his creditors in some supposedly equitable way, and it was said that, in the circumstances, the court ought to refuse the application of the mortgagee in order that the rents of the property mortgaged to him should be available for the purpose of equalising the situation as between him and the other less fortunate mortgagees. That argument, in my judgment, is based upon an entire misconception of the object of the Act. The object of the Act is to give a measure of protection to debtors against whom creditors are seeking to enforce their rights. On an application under the Act, in all but the simplest cases, the court is confronted with a number of facts. It is only necessary to refer to one of these, and that is the situation of other creditors who are not parties to the application. It is manifest that, if the court gives a creditor leave to proceed to execution, the result may be, as regards that particular debt, that the debtor has the funds to pay it. The result of paying that debt may be to leave him in such a position that he is unable to satisfy other creditors. Therefore, the result would be to work injustice between creditors, and also to put the debtor in such a position that he would have to deal with all his creditors, each of whom would have been affected by the order. If the court refuses to give the creditor leave to proceed, there is the difficulty that the fund left in the hands of the debtor may be applied to the payment of other creditors, and the creditor who has applied may thus be penalised. That shows the difficulties of the court in administering this Act. An attempt was made to deal with this matter by the Courts (Emergency Powers) Act, 1940, but the difficulty in practice still remains. That difficulty, it is clear, had impressed itself upon the mind of the legislature, and it was one of the reasons why the Liabilities (War-Time Adjustment) Act, 1941, was passed. In the present case, what the debtor has to establish is that the result of an order in his favour, if the judge is minded to make it, must be something more than a mere equitable distribution of his assets amongst all his creditors. He must show that the result of the order will be to give him a relief from the misfortunes which the war has brought upon him. The present application is not for the benefit of the debtor. It is for the benefit of other mortgagees. What I have said so far concerns the general scope of the Act as it relates to the case of unsecured debtors. As between unsecured creditors, if one is allowed to proceed to execution, he may thereby get an advantage over other unsecured creditors, and refusing relief to the debtor may involve injustice. In the case of secured creditors, on the other hand, there is at the outset an inequality between them. One may have a good security and the other may have a bad one. It is not for the court to make an order which will give the creditor with the worse security the advantage which belongs to the creditor with the better one. The court is concerned primarily with the debtor, although it must bear in mind the consequences of its action as regards other creditors. Where there are only unsecured creditors, the position differs from that where there are both secured and unsecured creditors. In the latter case, there is an existing inequality, which it is no part of the court's function to remove. In my opinion, the appeal fails and must be dismissed with costs.

A

Clauson, L.J.: I agree, for the reasons given by Lord Greene, M.R. I wish to add that, having listened to the very full argument of counsel, he has not succeeded in satisfying me, first, that the judge exercised his discretion wrongly, or, secondly, that the judge, in exercising his discretion, acted upon any but a correct interpretation of the Act.

B

du Parcq, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Schindler & Co.* (for the appellant); *Bull & Bull* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

C

Re TANKARD, TANKARD *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD.

[Chancery Division (Uthwatt, J.), **November 5, 1941.**]

D

Executors—Payment of debts—Interest-bearing debt—Delay—Loss to estate—Liability of executors.

The testator appointed the defendants his executors and trustees and gave them power to retain investments in their absolute discretion. The defendants failed to pay an interest-bearing debt within one year from the testator's death. In consequence thereof loss was caused to the estate owing to the fall in value of assets which had to be sold to discharge the debt. The beneficiaries claimed damages from the executors for maladministration:—

E

Held: (i) the question whether or not damage has resulted from non-payment of a particular debt is independent of the question of the non-payment involving maladministration. There is no rule of law that executors must pay debts within the year, but, if they fail to do so, the onus is on them to justify the delay. The executor's duty is to pay with due diligence. This duty extends to all debts, whether interest-bearing or not, and is owed to beneficiaries and creditors alike, but it does not arise from a duty to prevent avoidable loss, but from the duty to administer the estate.

F

(ii) the assets in question were shares of a speculative nature, and having regard to the prevailing market conditions the evidence showed that the power of retention had been duly exercised.

G

[**EDITORIAL NOTE.** It is well-established that, where executors, acting in the honest exercise of their discretion, postpone the realisation of assets beyond the year allowed by the general rule, they will not be liable for any loss occasioned by the postponement. Where, as in the present case, the will empowers the executors to retain assets as long as they think fit, they are not liable for errors of judgment if they act honestly and with ordinary prudence. Here the assets were shares which had been bought as a speculation, and, the defendants' manager having carefully considered the question of selling them in relation to the then market situation, the judge held that the power of retention had been duly exercised. The fact that damage has resulted from the non-payment of a debt is not conclusive proof of maladministration. The duty to pay debts is not a duty to prevent every avoidable loss. It is a duty that arises from the principal duty of an executor—that is, to administer the estate of the deceased. In the course of such

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administration, the executor must pay any debts owing by the deceased, but he is not to be charged in respect of loss incurred by delay in payment if, in so delaying payment, he has followed the instructions given to him in the will and has reasonably exercised the powers thereby conferred on him. The decision here, though the judgment discusses the general nature of the duty of executors as to the payment of debts, is based on the fact that the executors duly exercised the power of retention given by the will. It may be noted that, though the debt which the executors failed to pay was owed to a bank, of which they were a subsidiary company, the plaintiffs made no suggestion that the course of administration was in any way influenced by the bank.

As to Executors' Duty to Realise Assets, see HALSBURY, Hailsham Edn., Vol. 14, pp. 319, 320, paras. 593, 594; and for Cases, see DIGEST, Vol. 23, pp. 321-324, Nos. 3887-3908.]

Cases referred to:

(1) *Hall* v. *Hallet* (1784), 1 Cox, Eq. Cas. 134; 24 Digest 567, *6054*.

(2) *Re Stevens, Cooke* v. *Stevens*, [1898] 1 Ch. 162; 24 Digest 660, *6864*; 67 L.J.Ch. 118; 77 L.T. 508.

(3) *Grayburn* v. *Clarkson* (1868), 3 Ch. App. 605; 24 Digest 627, *6553*; 37 L.J.Ch. 550; 18 L.T. 494.

Action by the beneficiaries under the will of George Edgar Tankard against the executors and trustees thereof, the Midland Bank Executor and Trustee Co., Ltd., for maladministration. The facts are fully set out in the judgment.

J. Norman Daynes, K.C., and *Donald Cohen* for the plaintiffs.

Charles Harman, K.C., and *Pascoe Hayward* for the defendants.

Uthwatt, J.: In this case, the plaintiffs, the widow and children of George Edgar Tankard, claim damages against the defendants, the Midland Bank Executor and Trustee Co., Ltd., a wholly owned subsidiary of the Midland Bank, Ltd., who are the executors and trustees of the will of George Edgar Tankard, in respect of an alleged maladministration of the testator's estate. The act of maladministration alleged consists of the failure of the defendants within a year from the testator's death to pay, and to realise assets within that year for the purposes of paying, an interest-bearing secured debt due by the testator to the Midland Bank, Ltd., that debt being only one of the several debts owing by the testator at his death. Damages are claimed on the basis of the increased cost to the estate of discharging the debt in question, such increased cost being due to the fall in value of assets comprised in the testator's estate.

The material facts are these. By his will, dated July 11, 1938, Tankard appointed the defendants to be the executors and trustees of his will upon the conditions specified in the company's handbook in use at the date of his will, and declared that the defendants should be entitled to remuneration (free from duties, and in addition to the customary share of brokerage) in accordance with the company's scale of fees in force at the date of his will. The testator then bequeathed to his wife his personal chattels, and also bequeathed to her during her widowhood an annuity of £1,000 free of income tax, and directed the defendant company to set apart, as soon as they were in a position to do so after his death, funds sufficient to pay the annuity. The testator then provided as follows:

> As to all the remainder of my estate both real and personal I give devise and bequeath the same unto the company [the defendants] upon trust to sell call in and convert into money (subject to the directions hereinafter contained) such part or parts thereof as shall not consist of money and after the payment thereout of my debts funeral and testamentary expenses to hold the balance of the moneys arising from such sale calling in and conversion and all other moneys arising from or forming part of my estate in trust to divide the same into fourteen equal parts and to hold three of such equal parts for each of my two sons and two of such equal parts for each of my four daughters [on certain trusts].

The testator then directed that the shares of his children should be held upon trust to pay the income of them respectively until the death or remarriage of his wife or until his younger son attained the age of 25 years, whichever event should be the later, and thereafter upon trust for his children respectively absolutely. The will then contained provisions which were to take effect in the event of any child of the testator's dying in his lifetime or surviving him but dying before attaining a vested interest. The will then provided as follows:

> I empower the company to retain any part or parts of my estate in the form of investment existing at the time of my death for so long as the company in its absolute discretion may think fit without being responsible for any loss occasioned thereby and I particularly request the company to retain my shares in Hall Tankard & Co., Ltd., and in any other private limited company for so long as the company shall consider it in the interests of my estate to do so my wish being that my sons shall ultimately be given the opportunity of purchasing such shares on such terms as my sons and the company may agree to be equitable.

There is then a direction that:

> The net income produced from all or any part of my estate howsoever invested and of whatsoever description shall as well during the first year after my death as afterwards be applicable as income under the trusts [of the testator's will].

The testator died on Sept. 21, 1938, and his will was proved on Dec. 17, 1938. He left him surviving, in addition to his widow, six children, of whom the youngest was born on June 22, 1921.

The organisation of the defendants consists of a head office in London, certain London branches and some seventeen country branches. The handbook of the defendant company in force at the date of the testator's will states their remuneration, and also contains the following condition:

> It is a condition of the company's appointment as executor or trustee that the company may in either such capacity act by its proper officer or officers.

Wilson was the branch manager employed at the Leeds branch of the defendants' organisation, and the functions of the defendants in the matter of the testator's estate were exercised by him on their behalf. In the course of the hearing, it was conceded that Wilson was a proper officer within the meaning of the condition contained in the company's handbook, and, therefore, any discretions which were properly exerciseable by the defendants could be deputed to and exercised by him, and there is no doubt that the exercise of the discretions which were relevant in this case was in fact deputed to Wilson, and that he was the only person connected with their exercise.

For the purpose of their business, the defendants issued instructions to their branch managers as to the way in which the managers were to carry on their duties, and those instructions may, it is assumed, show the general policy which the defendants adopt in the course of administration. Those instructions deal with the realisation of assets comprised in a deceased's estate required to meet the payment of duties, debts and legacies, and provide that the realisation is to be left to the discretion of the branch manager, who is directed to obtain advice from the estate stockbroker. It is immaterial to consider these instructions, for compliance with them would not absolve the defendants from a liability which might otherwise attach to them, and non-compliance would not attract a liability to which they were not otherwise subject. It is right, however, to say that I see no ground for criticising the instructions, and, if it be relevant, no ground for thinking that Wilson did not follow them.

The assets of the estate (apart from assets specifically bequeathed) consisted of some land of small value, a sum of £2,524 payable on a policy of insurance on the testator's life, a sum of £3,700 or thereabouts owing by the Halifax Building Society, and various investments, which included 6,000 shares of 5*s.* each in Prices Trust Co., Ltd., and some other assets of comparatively small value. The estate was valued for the purposes of estate duty at the sum of £39,240, the shares in Prices Trust Co., Ltd., being valued at 33*s.* 9*d.* each. Prices Trust was not a private company. The testator's liabilities at his death consisted in substance of the sum of £9,147 9*s.* 9*d.* owing to the Midland Bank, Ltd., and carrying interest at the rate of 1 per cent. over bank rate, this sum being charged on the shares in Prices Trust Co., Ltd., and all other securities included in the estate, a sum of £4,048 9*s.* 10*d.* owing to Hall Tankard and Co., Ltd., and carrying interest at the rate of 1½ per cent. per annum, and a sum of £1,000 owing to the executors of S. W. Tankard, deceased, and of certain small sums amounting in all to less than £200.

The estate does not appear to have presented any particular difficulties in administration. There was, indeed, a dispute with the Inland Revenue as to the value for the purpose of estate duty of shares in Hall Tankard and Co., Ltd., but the value was ultimately agreed in Aug., 1939. There was also a dispute on value arising out of a business carried on by the testator under the name of Tom Richardson. That dispute was not settled until the latter part of 1939. However, neither of these matters is, for present purposes, of any importance. It was not alleged by the defendants that there was at any time after the testator's death until shortly before the beginning of the war any difficulty in selling shares in Prices or in selling any of the securities comprised in the charge to the Midland Bank, Ltd. As regards the shares in Prices, evidence was given that dealings on the Stock Exchange in London were frequent, and it is clear that, had the defendants determined to sell the shares in Prices, they could have done so within a year from the testator's death at prices higher than those which were obtained on the subsequent realisation. The Stock Exchange list prices during the year varied between 40*s.* 6*d.* per share and 25*s.* 3*d.* per share. It is not necessary, having regard to the pleadings and the course of the proceedings, to refer to the general course of administration of the estate. It is sufficient to state that £2,000 was paid on June 24, 1939, in part reduction of the debt due to the Midland Bank, Ltd. On Oct. 3, 1939, £200, and on Nov. 10, 1939, £3,000, were applied towards its further reduction. The debt was completely discharged in Mar., 1940. The sums applied in and after Oct., 1939, in reduction of the debt were found substantially by the realisation of the shares in Prices. These shares were sold at a price slightly under 20*s.* per share.

Before dealing with the issues in the case, I make the following observations upon the pleadings and upon the course of the trial. First, no suggestion was made, either in the pleadings or in the course of the proceedings, that the defendants were in any way influenced in determining their course of action in the administration of the estate by the Midland Bank, Ltd., or by the fact that it was the Midland Bank, Ltd., who were creditors of the estate. Secondly, no complaint is made as to non-application of cash for the time being in the hands of the defendants in partial liquidation of the debt to the Midland Bank, Ltd. Thirdly, neither by the pleadings as finally amended nor in the course of the hearing was any complaint made as to the non-payment of any debt of the testator other than that due to the Midland Bank, Ltd. Fourthly, no complaint was made by the statement of claim that, apart from the duty to pay the debt due to the Midland Bank, Ltd., the defendants committed any breach of duty in not converting the shares in Prices, or any of the other assets of the testator, within a year from the testator's death. Fifthly, in the course of the proceedings it was stated at the bar that the proceedings were not brought to recover any damages resulting from the fact that interest was payable and paid on the debt in question, and that, if the plaintiffs were wrong in their contention that assets ought to have been sold to liquidate the debt to the Midland Bank, Ltd., within a year from the testator's death, their action entirely failed. Sixthly, the plaintiffs in their pleadings laid particular stress on the course pursued by the defendants as regards the shares held by the estate in Prices Trust Co., Ltd., and in the proceedings before me it was only the position of those shares which was discussed in detail. Lastly, it was agreed on the hearing that I should confine myself to the question whether there had been a breach of duty on the part of the defendants, leaving the question of damages (if any) to be determined by an inquiry.

The plaintiffs' contention in law is that *prima facie* it was the duty of the defendants to sell sufficient assets to clear the estate of debts within a year from the testator's death, that, as the estate was not so cleared, the onus rests on the defendants to satisfy the court that they exercised a proper discretion as to the retention of assets and non-payment of debts, and that, upon the facts, no such proper discretion was exercised.

The point was put somewhat higher in para. 14 of the statement of claim, as alternatively amended. That paragraph also states the basis upon which damages are claimed, and runs as follows:

> For the purposes of discharging the said debt to the bank it was the duty of the defendant to sell a sufficient part of the testator's estate at the most favourable time within a year from the testator's death. As no other asset was in fact sold a sufficient number of the said shares in Prices should have been sold as aforesaid. Alternatively, a rateable proportion of each investment other than the investments requested by the said will to be retained should have been sold as aforesaid. The defendant company failed in its said duty and in consequence of such failure the sales referred to in para. 11 hereof [the sale of Prices' shares] had to be effected at greatly reduced prices.

The defendants do not concede that there is owed to the beneficiaries any such duty to pay debts as is contended for by the plaintiffs, but, assuming that there is such a duty, they contend that the power to retain assets was in this case duly exercised, and that no complaint can, therefore, be made as respects their conduct. They further argue that damages of the nature claimed are too remote.

The first question which I have to consider is the duty of an executor in regard to the payment of debts. Apart from any provisions contained in the will of a testator which expressly or impliedly deal with the payment of the debts, it is the duty of executors as a matter of the due administration of the estate to pay the debts of their testator with due diligence having regard to the assets in their hands which are properly applicable for that purpose, and, in determining whether due diligence has been shown, regard must be had to all the circumstances of the case.

It was contended by the defendants that this was not a duty which was owed to beneficiaries. In my opinion, this contention is not correct. The duty is owed, not only to creditors, but also to beneficiaries, for the ultimate object of administration of an estate is to place the beneficiaries in possession of their interest, and that object cannot be fully achieved unless all debts are satisfied. Where the debt bears interest, the duty to pay so as to relieve the estate of the burden of interest is clear beyond dispute (*Hall* v. *Hallet* (1), where the question arose in a suit for administration by beneficiaries brought in the Court of Chancery).

It was suggested in connection with an argument on the remoteness of damages claimed in this case that the duty applied only as respects interest-bearing debts, but I see no reason for so confining the duty. Where interest-bearing debts are not paid and assets are in hand properly applicable for the purpose, the loss occasioned to the estate by non-payment may, on a comparison of the rate of interest payable on the debt and the rate of interest earned by the estate, be obvious. Where the debt does not carry interest, or where, in the case of an interest-bearing debt, the interest earned by the assets which might properly be applied in paying the debt exceeds the interest payable on the debt, there may still be a loss to the estate in other directions—for example, in the costs occasioned by the executor defending proceedings brought by a creditor at common law to obtain payment of his debt. However, it appears to me that the question as to whether or not damage has in fact resulted from non-payment of a particular debt is independent of the question as to whether or not there was been any maladministration involved in non-payment. It would be incorrect, in my opinion, to state the executor's duty to pay debts as arising out of a duty to prevent avoidable loss. His duty is to administer the estate, and included in that duty is the obligation to all concerned to pay debts. Naturally the question is not mooted unless loss in some form is suggested, and no doubt the general rule is that the loss stated to be due to a breach of the executor's duty should be alleged and proved at the trial, but, if the court is satisfied that there has been a breach of duty, then it is open to the court in a proper case to make a declaration as to the breach of duty by the executor and to direct an inquiry as to damages : *Re Stevens, Cooke* v. *Stevens* (2), *per* CHITTY, L.J., at p. 172.

With respect to the period within which debts should be paid, there is, in my opinion, no rule of law that it is the duty of executors to pay such debts within a year from the testator's death. The duty is to pay with due diligence. Due diligence may, indeed, require that payment should be made before the expiration of the year, and the circumstances affecting the estate and the assets comprised in it may justify non-payment outside the year, but, if debts are not paid within the year, the onus is thrown upon the executors to justify the delay. No case was cited to me which states the rule in these direct terms, but it appears to me to be implicit in the statements as to the duties of conversion of assets incumbent on the executors which are made in *Grayburn* v. *Clarkson* (3), at p. 606. That, in my view, is the position, apart from any provision contained in the will of the testator. As against creditors, the provisions of the testator's will which relate to the realisation of his assets, or which otherwise bear upon the payment of debts, are irrelevant. As against beneficiaries, the position is different. Beneficiaries take their interest under the will only upon the terms of the will. As respects them, full effect has to be given to any provisions which either in express terms or by implication modify the executor's duty of paying debts with due diligence.

In the present case, the provision relied on is the power to retain assets. Upon the construction of the will, I am of opinion that the power of retention was exerciseable notwithstanding the facts that debts of the testator were outstanding and that there was not sufficient cash in hand to meet the debts. The primary trust for conversion applies to the whole residue of the testator's estate other than money, and the proceeds resulting from the execution of that trust are treated by the testator as the fund from which debts are to be paid. The power of retention is in terms applicable to all the assets comprised in the estate. Assets as respects which the power is for the time being duly exercised are excluded from the assets which, under the testator's scheme, need—so far as beneficiaries are concerned—be applied in payment of debts. Beneficiaries cannot complain if the directions given by testators are adhered to.

The next question is whether I am satisfied on the facts of the case that the power of retention was duly exercised. No attack was made by the plaintiffs at the trial upon the propriety of the retention of any assets other than the shares in Prices. It is not disputed that the shares were of a speculative character. With the other shares charged to the Midland Bank, Ltd., they were, to Wilson's knowledge, bought as a speculation. The average sum paid for the bulk of the Prices' shares was 50*s*. per share. They reached a price of 68*s*. in the testator's lifetime, but he sold none of them. Wilson was perfectly frank as to his attitude. He found the estate saddled with speculative assets, and thought it right, in the interests of the estate, to give the speculation a fair run. That, however, is not the same thing as saying that he embarked on a policy of speculation. The shares were carefully watched from an investment point of view. In the course of the executors' year, there were legislative proposals relating to the limitation of dividends, the excess profits tax was introduced and the possibility of war became apparent. These matters were considered by Wilson in connection with the retention of the shares. From time to time he consulted a stockbroker on the question of selling or retaining the shares, and he was advised that, both intrinsically and from a market point of view, the shares ought to be held. Wilson, indeed, had information as to the shares from other sources, and that other information confirmed his view as to the desirability of retaining them. None of the beneficiaries at any time asked that the shares should be sold, and, indeed, the real objection of Mrs. Tankard before the action was to the sale of the shares, an objection of which traces remained in the statement of claim until it was amended at the trial.

I am satisfied that throughout Wilson had at the top of his mind the question of realising or not realising the shares, formed an intelligent judgment upon the matter, and came to his conclusion to retain the shares with the existence of this debt to the bank in his mind as one of the relevant matters to be considered. The result has been unfortunate to the estate, but the liability of the defendants does not depend on results. In my opinion, therefore, the power of retention was duly exercised. In these circumstances, it is unnecessary for me to consider whether or not damages of the nature claimed are too remote, and I express no opinion upon that point.

Action dismissed. Costs of plaintiffs to be taxed as between party and party. Costs of defendants to be taxed as between solicitor and client and both to be paid out of the estate.

Solicitors: *Church, Adams, Tatham & Co.*, agents *for Day & Yewdall*, Leeds (for the plaintiffs); *Coward, Chance & Co.* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re HIRST, PUBLIC TRUSTEE *v.* HIRST.

[Chancery Division (Morton, J.), **October 31, November 3, 1941.**]

Rentcharges and Annuities—Annuity given free of all deductions—Right to deduct New Zealand social security contribution.

By a codicil to his will, the testator gave two annuities of £52 each, such annuities to be paid " clear of all deductions whatsoever (including my trustee's income management fee and income tax at the current rate deductible at the source or payable in New Zealand so long as they reside there)." The annuitants lived in New Zealand, where a tax known as the social security contribution was payable on income. The Public Trustee, as trustee of the will, asked whether these annuities were to be paid free of this tax :—

Held : notwithstanding the fact that this tax was assessed and collected similarly to income tax, it was not, on the true construction of the New Zealand Social Security Act, 1938, by which it was levied, income tax. The enumeration of specific deductions indicated that the testator meant to include in the term " deductions " burdens (such as income tax) which it did not normally cover. The social security contribution sufficiently resembled income tax and was included in the deductions free from which the annuities were given.

[**EDITORIAL NOTE.** The authorities clearly lay down that an annuity given free of all deductions does not in general exempt the annuitant from the burden of income tax. In the present case the testator used words indicating an intention that the term " deductions " should include income tax. The question was whether that word also covered a New Zealand tax called the social security contribution. This tax resembles the income tax of that country in respect of the way in which it is assessed, collected and recovered, and it is held that the word "deductions," upon its proper construction here, includes this New Zealand tax.

As to Payment of Annuities Free from Deductions, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214, 215, para. 286 ; and for Cases, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to :

(1) *Re Loveless, Farrer* v. *Loveless,* [1918] 2 Ch. 1 ; 39 Digest 167, *585* ; 87 L.J.Ch. 461 ; 119 L.T. 24.

(2) *Re Saillard, Pratt* v. *Gamble,* [1917] 2 Ch. 401 ; 39 Digest 167, *584* ; 86 L.J.Ch. 749 ; 117 L.T. 545.

Summons to determine the construction of a bequest given by a codicil to the will of the testator, John Bracken Hirst. The testator made his will on Feb. 12, 1930. He made a codicil on Mar. 4, 1937, and died, domiciled in England, on Sept. 5, 1938. His will was admitted to probate at the Principal Probate Registry on Nov. 8, 1938. The facts are fully set out in the judgment.

H. Rose for the plaintiff, the Public Trustee.

C. D. Myles for the first defendant, the widow.

I. J. Lindner for the second defendant, an infant.

E. M. Winterbotham for the third defendant, an annuitant.

L. R. Norris for the fourth defendant.

Morton, J. : The testator, who died on Sept. 5, 1938, by a codicil to his will dated Mar. 4, 1937, gave and bequeathed to his two unmarried sisters, whose address in New Zealand is given in the codicil :

> . . . an annuity of £52 each (£1 each per week) to be paid if possible without inconvenience or extra expense by my trustee by equal instalments the first whereof shall be made as soon as possible after my death.

Then, after providing that the trustee might provide for payment of the two annuities by appropriation of part of his estate, and making certain other provisions which I need not read, the testator continued as follows :

> And I further declare that the said two annuities shall be paid clear of all deductions whatsoever (including my trustee's income management fee and income tax at the current rate deductible at the source or payable in New Zealand so long as they reside there) and that any rebate allowance or repayment of income tax which may be allowed or made to the said annuitants shall enure for her or their benefit.

In cl. 3, he said :

> I now declare that in payment of the income on my trust estate to my wife during her life and to my adopted daughter as mentioned in my said will my trustee shall first deduct and pay the Public Trustee's income fee.

I have already held that the words " income tax at the current rate deductible at the source " refer to British income tax.

As regards the position in New Zealand, it appears from the document exhibited to the affidavit of Albert Cecil Fookes, filed on Mar. 27, 1941, that there is no liability in New Zealand for income tax in that country in respect of the two annuities of £52 each. These annuities are payable to women of very slender means who still reside in New Zealand. It is plain that, if income tax were payable in New Zealand, the testator intended to exempt the annuitants from having to bear it. There is, however, payable in New Zealand, an annual sum which is imposed by the Social Security Act, 1938, and is therein referred to as " the social security contribution."

The question which I now have to determine is whether, on the true construction of this codicil, the testator has freed the annuitants from their liability to pay this social security contribution out of their own pockets, and has provided in effect that the annuitants shall receive, not only the £52 annuity, but a further sum out of his estate sufficient to meet the social security contribution. It seems to me that there are really two questions which I have to decide under this head. First of all, is the social security contribution " income tax payable in New Zealand " within the meaning of the words used in the codicil ? For that purpose, I must examine the legislation in New Zealand which has imposed this burden and see whether the social security contribution is accurately described as " income tax payable in New Zealand."

The Social Security Act, 1938, is dated Sept. 14, 1938, and is divided into five parts, of which Part IV is headed " Financial Provisions." The first section of that part of the Act is sect. 102, which provides as follows :

> This Part of this Act shall come into force on Apr. 1, 1939.

Thus the Act was passed, and the relevant provisions of the Act came into force, after the date of the testator's death. Sect. 103 provides as follows :

> There is hereby established in the Public Account a separate account to be called the social security fund.

Sect. 105 provides as follows :

> In addition to the moneys transferred or made payable to the social security fund in accordance with the last preceding section, there shall be payable into that fund (*a*) the proceeds of the social security contribution payable under this Part of this Act . . .

Then follow (*b*) and (*c*), which are not material for the present purpose. Sect. 108 provides as follows:

> The social security contribution referred to in sect. 105 (*a*) hereof shall consist of (*a*) a registration fee, and (*b*) a charge on salaries, wages and other income.

Sect. 109 is of some importance for the present purpose. Subsection (1) provides as follows: A

> The provisions in this Part of this Act relating to the assessment, collection and recovery of the social security contribution shall be administered as if the social security contribution were income tax.

Subsect. (2) provides as follows:

> Subject to any special provisions in this part of this Act, the Commissioner and Deputy Commissioner of Taxes and all other officers appointed for the purpose of the Land and Income Tax Act, 1923, shall have, in respect of the social security contribution, the same powers as they have in respect of income tax and, subject as aforesaid, all the provisions of that Act shall apply with respect to the social security contribution in the same manner in all respects as they apply with respect to income tax. B

Subsect. (3) provides as follows: C

> All references in this Part of this Act to the commissioner shall be deemed to be references to the Commissioner of Taxes.

It seems to me clear, in view of the provisions of this section, that the social security contribution is not properly described as "income tax payable in New Zealand," but is a separate tax, imposed by separate legislation, which is not income tax, but is to be treated as regards the assessment, collection and recovery thereof, as if it were income tax. The words "as if it were income tax" are inconsistent with the view that the social security contribution is income tax payable in New Zealand. D

There are certain other sections, to which I must briefly refer, which reinforce that view. I need not read sect. 113, which provides what the rates of the social security contribution shall be, but it may be material to refer to sect. 118. Subsect. (1) of that section is as follows: E

> The charge payable as hereinbefore provided in respect of any salary or wages shall be deducted therefrom at the time of payment by the employer or other person by whom the salary or wages are paid, and the employer or other person as aforesaid shall thereupon affix to the wages sheet or other prescribed document the requisite social security stamps and shall cancel them in prescribed manner or shall indicate in such other manner as may be prescribed that the charge has been deducted. For the purposes of this section, the expression "salary or wages" includes any bonus, gratuity, extra salary or emolument of any kind in respect of or in relation to employment or service, and includes special payments such as witnesses' or jurors' fees and any other payment or fees of a like nature. F G

It appears from that subsection that, in so far as the social security contribution is imposed on salary or wages, it is to be paid by a deduction by the employer at the time of payment. Sect. 118 (4) provides as follows:

> If, in the opinion of the Minister of Finance, the charge on any income other than salary or wages could be more conveniently collected if such income were deemed to be salary or wages, he may authorise the commissioner to collect the charge on such income as if it were salary or wages, and thereupon the charge shall be payable accordingly and the person by whom any such income is payable shall be deemed, for the purpose of this part of this Act, to be the employer of the person entitled to receive such income. The provisions of this subsection shall be applied in respect of any income notwithstanding that such income may be in any way protected against assignment or charge. H

Here we have a provision under which, in the case specified in the section, the social security contribution may be collected by deduction, made by the person liable to pay the income in question. The ordinary method of collecting the social security contribution in the case of income A other than salary or wages, however, is provided by later sections, which I shall now read. Sect. 120 (1) provides as follows :

> The charge imposed by this part of this Act in respect of income other than salary or wages, not being income to which the provisions of sect. 118 hereof apply, shall be due and payable by equal instalments on the first day of the months of May, Aug., Nov. and Feb. in the year following the financial year for which such income was derived, the first such instalment being due on May 1, 1939, in respect of income B derived for the financial year ending the Mar. 31 immediately preceding . . .

I need not read the rest of that section. Sect. 123 (1) provides as follows :

> For the purposes of the assessment and levy of the charge on income other than salary or wages, every person, whether liable for the charge or not, shall in each financial year make to the commissioner, within the prescribed time, such declaration or declarations as may be prescribed.

C Sect. 127 (5) provides as follows :

> Income derived elsewhere than from New Zealand shall be exempt from the charge imposed by this part of this Act if and so far as the Commissioner of Taxes is satisfied that it is derived from some other country within the British Dominions and that it is chargeable in that country with a special tax levied in respect of unemployment or social services.

That subsection, I think, reinforces my view that this contribution is not D " income tax payable in New Zealand." It appears to be regarded by the New Zealand legislature as a special tax levied in respect of unemployment or social services, and it is only in regard to some other country within the British Dominions which has a similar tax that this subsection applies. Having regard to the sections which I have read, and in particu- E lar to sect. 109 and sect. 127 (5), I hold that the contribution in question is not " income tax payable in New Zealand " within the meaning of the codicil.

I must now consider whether the contribution in question is included within the words " clear of all deductions whatsoever." It is, I think, F well-established by authority that in an English will the words " shall be paid clear of all deductions whatsoever," in the absence of any context, do not have the result of freeing an annuitant from payment of the income tax payable in respect of the annuity. I think I need only refer to *Re Loveless, Farrer* v. *Loveless* (1), where the actual words were " a G clear annuity of £2,000 during her widowhood." The Court of Appeal held in that case that the widow had to bear the income tax on the annuity. Swinfen Eady, L.J., said, at pp. 4, 5 :

> In my opinion, where there is a gift of an annuity or a clear annuity, or an annuity free from deduction or abatement, the annuitant has to bear the income tax, and the annuity is not given free of income tax ; or in other words, the will is not to be read H and construed as if it contained a gift of the annuity and of an additional sum equivalent to the income tax payable on it. In my opinion it is accurate to say, repeating words that I used in *Re Saillard, Pratt* v. *Gamble* (2) [p. 403] : "If the annuity is directed to be payable without any deduction whatever, or if the words were a clear yearly sum free from all deductions and abatement whatsoever, such a gift in those terms is not sufficient to give to the legatee the income tax in addition, but he must bear his own income tax."

Having regard to the authorities, if there had been nothing more in this will and codicil than the words " shall be paid clear of all deductions whatsoever," I do not think that I could have arrived at the conclusion that this social security contribution was included within these words, but I have this context in the present case. Immediately after the words "clear of all deductions whatsoever," the testator has inserted in brackets the words : A

> . . . including my trustee's income management fee and income tax at the current rate deductible at the source or payable in New Zealand so long as they reside there . . .

In my view, he is saying there : "Amongst the things which I regard as deductions are the three burdens which I have just specified." In other words, in this codicil the testator is regarding, for example, income B tax payable in England as a deduction, although it is not, strictly speaking, a deduction, and is not a deduction in the ordinary sense of the word, having regard to the authorities to which I have referred. For this reason, I cannot, I think, give the word "deductions" a limited meaning. It seems to me that, although this social security contribution C is not "income tax payable in New Zealand," it resembles income tax payable in New Zealand in respect of the way in which it is assessed, collected and recovered. If the testator regarded income tax payable in New Zealand (as in fact he did) as a deduction, I think that he would also have regarded the social security contribution as a deduction. I think that D his intention was that each of these two women should have the full amount of £52 for her own needs, without having to bear any charge which might be payable in respect of her annuity. He has specified certain things which he regards as deductions, and which are to be included in the deductions from which the annuitants are to be free. Probably he specified all the E matters which would impose a burden on the annuitant of which he was aware, and I think it would be impossible to limit to the three matters which he specified the freedom which he intends to confer on the annuitants.

On the wording of this codicil, although, as I have said, I do not think F that this social security contribution can be described as "income tax payable in New Zealand," I think that it is one of the deductions from which the annuitants are to be free.

It ought to be made clear, of course, in my declaration as regards British income tax that, although I hold that the annuities are free G from British income tax, it is only to the extent permitted by the Finance Act, 1941, s. 25—that is to say, up to 5*s.* 6*d.* in the £.

Declaration accordingly. Costs of all parties as between solicitor and client to come out of residuary estate.

H

Solicitors : *Peacock & Goddard*, agents for *J. Knight*, Bournemouth (for all parties).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re MARGOT BYWATERS, LTD.

[CHANCERY DIVISION (Simonds, J.), **November 24, 1941.**]

Companies—Winding up—Voluntary winding up—Distress—Stay of distress—Purchase tax.

A company in voluntary liquidation owed £501 in respect of purchase tax. An offer of 17*s.* 6*d.* in the £ was made by a nominee of the directors to all the trade creditors and the Commissioners of Customs and Excise. The latter refused this offer, and proceeded to levy distress for the amount owing in respect of purchase tax. The liquidators applied to the court for an order staying the distress :—

HELD : there were no special circumstances which would justify the court in allowing the distress to proceed, it being admitted that the purchase tax was not an assessed tax to which preference was given by the Companies Act, 1929, s. 264.

[**EDITORIAL NOTE**. In the case of a compulsory winding up, the Companies Act, 1929, s. 174 now makes it impossible for a creditor to levy a distress or execution on the goods of the company. The position is that the goods of the company are theoretically in the custody of an officer of the court and no interference with his custody and possession can be allowed. A voluntary winding up, on the other hand, is purely a domestic affair of the company and there is no theoretical reason why a creditor to whom the remedy of distress or execution is available should not exercise that remedy. There is, however, a practical reason why these remedies should be at least controlled by the court, for the purpose of the winding up, whether compulsory or voluntary, is the equitable distribution of the assets of the company among the creditors. When a distress is levied against the goods of a company in voluntary liquidation, the liquidator can always apply to the court to stay the distress, and he is entitled to an order unless the creditor can show that there are special circumstances justifying his proceeding with the distress. It should be noted that it was agreed that the purchase tax was not an assessed tax within the Companies Act, 1929, s. 264, and thus a preferential debt.

AS TO DISTRESS DURING VOLUNTARY LIQUIDATION, see HALSBURY, Hailsham Edn., Vol. 5, pp. 778, 779, para. 1337 ; and FOR CASES, see DIGEST, Vol. 10, pp. 1014, 1015, Nos. 7040-7044.]

APPLICATION by the liquidators of a company that distress levied by the Commissioners of Customs and Excise in respect of purchase tax should be stayed. The facts are fully set out in the judgment.

V. R. Aronson for the applicants, the liquidators.

H. O. Danckwerts for the respondents, the Commissioners of Customs and Excise.

SIMONDS, J. : This is a motion by John Thomas Morgan and Sidney Edward Lane, the liquidators of Margot Bywaters, Ltd., asking for an injunction restraining Philip Thomas Squibb and Richard Arthur Henry Lloyd from levying a distress upon the property of the company for arrears of purchase tax. An interlocutory injunction has already been granted by UTHWATT, J., and in effect I am asked to make that injunction permanent.

The circumstances are these. The company went into voluntary liquidation by a resolution passed on Mar. 25, 1941, and the applicants, Morgan and Lane, were the liquidators. Before that date the company had become liable to the Commissioners of Customs and Excise in the sum of £501 for purchase tax. Under the appropriate regulation, made under the authority of the Finance (No. 2) Act, 1940, s. 33 (1) (*g*), the commissioners authorised distress to be levied on the goods of the company for the purpose of raising the sum of £501 so owing. The only question which I have to decide is whether the commissioners ought to be allowed to proceed to levy that distress. The company is in voluntary liquidation, as I have said, and, therefore, the Companies Act, 1929, s. 174, does not expressly apply. That is to say, the distress is not automatically avoided by the liquidation. However, the only difference for this purpose between a compulsory and a voluntary liquidation is that, whereas, in the case of a compulsory liquidation, "any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents," where the liquidation is voluntary, it is necessary for the liquidator to come to the court to have such proceedings stayed, and the court will stay such proceedings unless there be extraordinary reasons or exceptional circumstances which justify the distress or other proceeding continuing. Here it is said that the special or exceptional circumstances which justify the court in allowing the distress to continue are these. It is clear from the approximate statement of affairs as at Mar. 8, 1941, which has been exhibited to the affidavit of English, that there is a large estimated deficiency of assets, amounting to over £15,000, and it is clear that, if the assets are distributed amongst the creditors of the company, the latter cannot expect a dividend of more than about 5*s.* in the £. It was in those circumstances that one Heimann, who was a nominee of the directors, or some of the directors, of the company, made an offer to all the trade creditors of the company, including the commissioners, to purchase their debts at a discount of 2*s.* 6*d.*—that is, to pay 17*s.* 6*d.* in the £ for their debts. Naturally enough, the trade creditors generally accepted that offer, so that Heimann stands in their shoes. The commissioners, if I may say so with respect, quite correctly thought it somewhat unseemly or inappropriate to assign to a subject a debt due to the Crown in respect of purchase tax, and, therefore, they declined this offer to buy them out at 17*s.* 6*d.* in the £, but they say, nevertheless, that they should proceed with their distress. If they proceed with their distress, there is not any doubt that they will get, not 17*s.* 6*d.* in the £, but 20*s.* in the £. The only question which I have to decide is whether there are here such extraordinary circumstances as to justify the court in allowing the distress to proceed. In my judgment, there are not. I can find nothing so to justify the court in the fact that Heimann made his offer, which appears to be generous, although I dare say not altruistic, to purchase the debts of creditors at 17*s.* 6*d.* in the £. He stands in their shoes, and I am unable to find from the fact that the Crown has thought it proper to refuse his offer any reason why, as against him, the Crown should be in a better position than it would be against the creditor in whose shoes he stands. Therefore, there is no such extraordinary reason as would justify me in allowing the distress to proceed.

I only have to add this in order to make the circumstances quite clear. I do not have to decide, for it is not contended on behalf of the Crown, that this is an assessed tax in regard to which any preference is given by the Companies Act, 1929, s. 264. Therefore, this case does not differ from any other case in which a creditor, not entitled to any preference, is seeking in a liquidation to enforce otherwise than by proof his claim against a debtor.

Solicitors: *Philip Taylor & Co.* (for the applicants); *Solicitor for Customs and Excise* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re APEX SUPPLY CO., LTD.

[CHANCERY DIVISION (Simonds, J.), **November 17, 18, 1941.**]

onsidered. COODEN ENGINEERING o., LTD. *v.* STANFORD. [1952] All E.R. 915.

imum payment clause—Sum to be paid if agreement n 9 months of commencement of hire—Whether liquidated lty—Fraud on bankruptcy laws.

A hire-purchase agreement provided by cl. 2 (10) that, if the owners within 9 months of the date of the agreement retook possession under cl. 2 (13), the hirers should pay, by way of compensation for depreciation of the goods, a sum which, together with the previous payments made by them, would equal a specified amount. Clause 2 (13) was in the usual form of a clause whereby the owners were entitled to retake possession on the happening of certain events. One of these events was, where the hirers were a company, the liquidation of the company. The hirers were in fact a company and within 9 months of the date of the agreement went into liquidation. Thereupon the owners gave notice under cl. 2 (13) and claimed a sum based on the provisions of cl. 2 (10). The goods subject to the agreement were at all times in the possession of a third party, but it was clear on the facts that, up to the time when the notice under cl. 2 (13) was given, the third party derived his right to possession through the hirers, and thereafter through the owners. The liquidators refused to pay the sum claimed on the following grounds: (*a*) the owners had not effectively retaken possession of the goods under cl. 2 (13) because the goods remained in the possession of the third party, (*b*) the sum claimed was a penalty, and (*c*) the provisions of cl. 2 (10) were in fraud of the bankruptcy laws:—

HELD: (i) the fact that the physical possession of the goods had not been altered did not mean that the owners had not exercised their rights under cl. 2 (13), as the nature of the possession was changed, so that thenceforth the goods were held to the order of the owners, and not to that of the hirers.

(ii) the sum claimed was neither a penalty nor liquidated damages, but was a separate contract to pay a certain sum in a certain event, and, that event having happened, the sum became payable. If it were a sum claimed as a penalty or liquidated damages, then it was, in fact, a genuine pre-estimate of the damage sustained.

(iii) the claim based on cl. 2 (10) was not in fraud of the bankruptcy laws. It was a claim which arose in a multitude of cases, only one of which was the possible liquidation of the company, and it was not, therefore, a contract by which someone obtained such an additional advantage in the event of the liquidation of the company as prevented the company's property from being distributed in accordance with the bankruptcy laws.

[**EDITORIAL NOTE**. The facts of this case can be briefly stated as follows. A hire-purchase agreement contained the usual clauses providing for the owners retaking possession of the goods and providing for a minimum payment. The owners retook possession of the goods upon the liquidation of the hirers and claimed the minimum payment. They were then met by numerous objections. In the first place, it was argued that the minimum payment was a penalty. The judge really disposes of this by a finding of fact that the sum payable was a genuine pre-estimate of the damage. However, in the course of his judgment, he also considers a number of unreported cases and reaches the conclusion that a minimum payment clause does not reserve a sum in the nature either of a penalty or liquidated damages upon breach of the principal hire agreement, but that the clause is itself an independent and separate contract under which a certain sum becomes payable upon the happening of certain events. In this he has adopted the reasoning of Greer, L.J., in *Chester & Cole, Ltd.* v. *Wright* (7). It was also argued that where the minimum payment is claimed on an insolvency, it is a fraud on the bankruptcy laws, since it places one creditor in a preferential position. This argument is rejected on the ground that the clause provides for many events besides insolvency and, therefore, cannot be said to be directed to the securing of any such advantage. A further important argument was based upon the absence of change of possession. This sufficiently appears from the headnote.

As to Payments under Hire-Purchase Agreements, see HALSBURY, Hailsham Edn., Vol. 16, pp. 519-522, paras. 765-768 ; and for Cases, see DIGEST, Vol. 3, p. 95, Nos. 251, 252.]

Cases referred to

(1) *Re Johns, Worrell* v. *Johns*, [1928] Ch. 737 ; Digest Supp. ; 97 L.J.Ch. 346 ; 139 L.T. 333.

(2) *Re Jeavons, Ex p. Mackay, Ex p. Brown* (1873), 8 Ch. App. 643 ; 5 Digest 659, *5870* ; 42 L.J.Bcy. 68 ; 28 L.T. 828.

(3) *Re Thompson, Ex p. Williams* (1877), 7 Ch.D. 138 ; 5 Digest 962, *7878* ; 47 L.J.Bcy. 26 ; 37 L.T. 764.

(4) *Elsey & Co., Ltd.* v. *Hyde* (1926), Jones and Proudfoot's Notes on Hire-purchase Law, 2nd Edn., p. 107.

(5) *Chester & Cole, Ltd.* v. *Avon* (1929), Jones and Proudfoot's Notes on Hire-purchase Law, 2nd Edn., p. 115.

(6) *Roadways Transport Development, Ltd.* v. *Browne & Gray* (1927), Jones and Proudfoot's Notes on Hire-purchase Law, 2nd Edn., p. 118.

(7) *Chester & Cole, Ltd.* v. *Wright* (1930), Jones and Proudfoot's Notes on Hire-purchase Law, 2nd Edn., p. 124.

(8) *Associated Distributors, Ltd.* v. *Hall*, [1938] 2 K.B. 83 ; [1938] 1 All E.R. 511 ; Digest Supp. ; 107 L.J.K.B. 701 ; 158 L.T. 236.

Application in the winding up of Apex Supply Co., Ltd., that the rejection by the liquidators of the applicants' proof for £676 12*s.* be reversed and the proof allowed in full. The facts are fully set out in the judgment.

F. A. Sellers, K.C., and *Pratt* for the applicants.

E. M. Winterbotham for the respondents.

Simonds, J. : This is an application in the winding up of the Apex Supply Co., Ltd. The applicants, the Industrial Discount Co., Ltd., ask that the decision of the joint liquidators of the company in rejecting their proof in the sum of £676 12*s.* may be reversed and that the proof may be allowed in full. The claim arises in this way. On July 1, 1940, the applicants entered into an agreement with the company in liquidation, the agreement being a common form of hire-purchase agreement.

Thereby the applicant company (called in the agreement the owners) agreed to let, and the company in liquidation (called in the agreement the hirer) agreed to hire, the goods specified in Part II of the schedule thereto upon the terms therein and in the schedule contained for the period of hire specified in the schedule. The goods described in the schedule were certain articles of secondhand machinery. By cl. 2 (1) of the agreement, the hirer agreed punctually to pay the instalments of rent specified in Part I of the schedule thereto at the times therein mentioned, and to pay interest at the rate therein stated. By the schedule, it was provided that a sum of £252 should be paid on or before delivery of the goods, that a total rent of £1,108 16*s.* should be paid by 12 monthly instalments of £92 8*s.* each, the first instalment to be paid one calendar month after the date of the agreement, and that the period of hire should be 12 months commencing from the same date. Then there is a statement as follows:

> The total rent is calculated as follows: Price of the said goods, £1,260; payment in respect of option to purchase, £252; balance, £1,008.

Then a charge of £100 16*s.* is added for finance. I need not read cl. 2 (2). Clause 2 (3) provides that the hirer shall at his own expense:

> . . . keep the said goods in good repair condition and working order to the satisfaction of the owners and make good all loss or damage thereto whether caused by fire accident or otherwise howsoever without pledging the credit of the owners for any repairs to the said goods or otherwise howsoever.

Then follow a number of common form clauses which I think I need not read. Then by subcl. (10) it is provided that, if the hirer should return the goods under cl. 3 (1), or if the owners should retake the same under cl. 2 (13) before the expiration of 9 months from the date thereof, the hirer should pay a further sum which, with the previous payments made by him, should equal the sum of £1,020 12*s.*, by way of compensation for the depreciation of the goods. Clause 2 (13), referred to in cl. 2 (10), is as follows:

> . . . if the hirer shall make indefault for 7 days payment of any of the instalments of rent payable hereunder or shall fail to observe and perform any of the terms and conditions hereof or if a receiving order in bankruptcy shall be made against the hirer or if the hirer being a company shall go into liquidation either compulsorily or voluntarily or if a receiver shall be appointed of the whole or any part of its assets and undertaking or if the hirer shall enter into a composition or arrangement (whether registered or not) with his creditors or if he shall execute a bill of sale of his effects or any of them or if any execution or distress shall be levied against him or any of his goods or effects or if he shall suffer any judgment or order against him for the payment of money to remain unsatisfied or uncomplied with or if he shall do or suffer anything whereby the owners' rights of ownership may be prejudiced it shall be lawful for the owners and their agents without formal demand to enter any place in which the said goods may be or the owners have reason to suppose that they are and to seize and retake possession of the said goods and to remove the same without prejudice to any other right of the owners hereunder without being liable to any action or other proceedings by the hirer or any person claiming through him.

Then subcl. (14) provided that, if, when the owners were entitled to resume possession of the goods, they were unable for any reason to obtain possession or to remove the goods, they should have certain rights, provided that such determination should not affect the liability of the hirer in respect of any past breach. Clause 3 of the agreement provided that the hirer might determine the agreement, subject to giving 7 days' previous notice to the owners at their registered office of his intention so to do, by returning the goods at his own cost and in good repair and condition to the owners at such address as they should require, but that he should remain liable for rent and damages (if any) for breach of his agreement up to the date of such return and for compensation (if any) under cl. 2 (10) thereof. That agreement being entered into, and the goods being duly delivered to the order of the company, the company fell on evil days, and in due course went into liquidation. On Sept. 11, 1940, the applicant company, through its director A. J. A. Kean, notified the Official Receiver as liquidator of the company in these terms :

> We have to advise you that under the terms of cl. 13 of the above agreement [this should read "cl. 2 (13) of the said agreement"] we have, by our agents, retaken possession of the goods the subject-matter of the above agreement and the hiring of same is therefore now terminated.

At a later date, the applicant company duly put in their proof in the liquidation of the company in the sum of £676 12*s*., being the sum alleged to be due to them under the provisions of cl. 2 (10) of the agreement. That proof was rejected by the liquidators on these grounds :

> (1) That the hire-purchase agreement dated July 14, 1940 [it should be July 1] was absolutely determined on Sept. 11, 1940, in purported exercise of the right of the owners under cl. 2 (14) thereof which clause does not reserve the rights (if any) which may have or which may be alleged to have accrued to the owners under cl. 2 (10) thereof. (2) Alternatively, the sum which cl. 2 (10) of the agreement purports to make payable in the events there stated is in the nature of a penalty and not liquidated damages and is unenforceable.

In addition to those two grounds of rejection, counsel for the company has been allowed to put forward two further grounds of rejection—namely, (i) that the agreement, though in form a hire-purchase agreement, was not in truth and in substance such an agreement, but was a mere device to give the applicant company some form of additional security, so that the document was in substance an unregistered bill of sale, and (ii) that the provisions of the agreement upon which the applicant company relies are in fraud of the bankruptcy laws, as being merely an attempt to give the applicant company, in the event of the company's bankruptcy or liquidation, something which, but for that liquidation, they would not have had.

It is necessary for me to examine briefly those several grounds upon which it is claimed that this proof should be rejected. With regard to the first ground which I have read—namely, that the applicant company did not effectively exercise the right given by cl. 2 (13) of the agreement of seizing and retaking possession of the goods—I think that that ground of rejection is based upon a misconception. The goods in question were at all relevant times in the physical possession of a company known as Newman Engineering, Ltd. Prior to Sept. 11, 1940, they were in possession of Newman Engineering, Ltd., as lawfully claiming under the company in liquidation. It is quite clear that from and after Sept. 11, 1940, they remained in pssoession of Newman Engineering, Ltd., as claiming through the applicant company, and the fact that from that date they derived title from the applicant company is abundantly clear from the fact that in subsequent proceedings the applicant company asserted their title and recovered judgment against Newman Engineering, Ltd. It is not necessary, in order that possession may be effectively retaken under cl. 2 (13), that the applicant company should take physical possession of the goods in question. It is sufficient that the nature of the possession of the person in whose possession the goods are should change, so that henceforth he holds to the order of the applicant company, and not to the order of the hirer. Therefore, the first ground of rejection, in my judgment, fails, for the reason which I have stated.

I defer consideration of the second ground upon which the liquidators have rejected the proof, and turn to the ground put forward by counsel that in substance this was not a hire-purchase agreement, but was a device by which the applicant company obtained security for a loan. There was, I think, some ground for the liquidators, through their counsel, putting forward this view. Indeed, it would be difficult to come to any other view of the transaction upon a consideration only of the documents which passed between the vendors of the goods and the company in liquidation. However, I am well satisfied, upon reading the evidence, that the documents give a false view, though with no sinister motive whatever, of the real nature of the transaction. I am satisfied that the applicant company were the purchasers of the goods, and that, as purchasers and owners of the goods, they entered into the hire-purchase agreement which I have to consider. If I were to take a different view of the transaction, I should be utterly discrediting the evidence which has been given by the deponents, the directors of the applicant company. I see no ground whatever for doing that, and so little ground did counsel for the company think existed for that view that he did not think fit, in the exercise of his discretion, to cross-examine the deponents. That ground of rejection, therefore, also fails.

Next, I can conveniently deal with the contention that the provision upon which the applicant company relies is bad as being a fraud upon the bankruptcy laws. That is based upon the well-known principle upon which Tomlin, J., relied in *Re Johns, Worrell* v. *Johns* (1), in which he cites, amongst other things, a passage from the judgment of Mellish, L.J., in *Re Jeavons, Ex p. Mackay, Ex p. Brown* (2), at p. 648 :

> That is to say, as I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws.

The same principle is stated in *Re Thompson, Ex p. Williams* (3), at p. 143. That case was also cited in *Re Johns, Worrell* v. *Johns* (1), where Tomlin, J., came to the following conclusion, at p. 748 :

> I think the true inference to be drawn from the consideration of this document before me—just as the true inference was drawn in *Re Thompson, Ex p. Williams* (3)—is that here there is a deliberate device to secure that more money should come to the mother if the son went bankrupt than would come to her if he did not ; and, that being so, it seems to me that the device is bad.

I see no ground whatever for supposing that this provision was aimed at anything of that kind. The claim which the applicant company are putting forward in this case is based upon cl. 2 (10) of the agreement, which provides that, if the hirer shall return the goods under cl. 3 (1), or if the owners shall retake the same under cl. 2 (13), the claim which they now put forward is to arise. That claim arises in a multitude of circumstances, one only of which is the possible liquidation of the company, and it would be extravagant, in my view, to suggest that this is a clause which is aimed at defeating the bankruptcy laws or at providing for a distribution differing from that which the bankruptcy laws permit. Accordingly, that ground of rejection also must fail.

I come finally to the ground of rejection which has caused me most difficulty. It is said that the payment provided for by cl. 2 (10) is in the nature of a penalty, and not liquidated damages, and, accordingly, is not enforceable in this court. This is not a matter which comes before the court for the first time, although the reports do not contain any of the numerous cases in which clauses of this kind have been considered by the court. However, I have had the advantage of reading a transcript of the shorthand notes of several cases in Jones and Proudfoot's Notes on Hire-purchase Law, 2nd Edn., p. 107 *et seq.* The first case is *Elsey & Co., Ltd.* v. *Hyde* (4), which came before the Divisional Court of the King's Bench Division consisting of Salter and Fraser, JJ. There the court had to consider a hire-purchase agreement not in any material respect distinguishable from the agreement which I have to consider, and there the claim was brought to recover a sum of money under cll. 6 and 8, which do not differ materially from subclauses (10) and (13) of the agreement which I have to consider. Salter, J., said [pp. 111, 112]:

> . . . this action is brought under cl. 6 to recover in each case the difference between the sums which have been paid, the original £5 and the sums paid since—it is the difference between those sums and £25. The learned judge [the county court judge] has held that the amount is not recoverable, because this is a penalty. I think the question whether it is a penalty or not is clearly a question of law. The question is whether he is right in law in so holding. As I understand, the question whether the sum of money which the parties have agreed shall, in certain events, be paid by one to the other, is a penalty or not, and whether that agreement is, therefore, enforceable is a question which arises in cases where the contract provides that if one party has done something which he ought not to do and which had prejudiced the other, it would give the other the right to damages against him. Then where the parties have purported to fix the amount of damages, the question is whether that is a genuine agreement liquidating the damage, or whether it is an oppressive thing and not, as has been called, a genuine pre-estimate of damage. But those questions arise, as I understand, in cases where the person who is to pay has broken a contract with the other or done something which entitles the other to damages against him. This question is whether the person injured can sue on the contract for the agreed sum or whether he should be remitted to his rights and show what damage he has sustained, which may of course be more or may be less than the agreed sum. My difficulty in this case has been to see that this is a case of penalty at all or that it comes within that principle. I test the matter by looking at cl. 6 and looking at the various events in which this money is to be paid. It may be said there are two events, or it may be said that there is only one. The event in which it is payable is the termination of the hiring during the first eight months. That would be within the first two-thirds of the normal period. It is in that event that this money is to be paid. It might be said that there are two events because the hiring may be determined either by the hirer or the owner. It is, I think, to be observed that in order to make cl. 6 apply where the determination of the hiring is by the owner, it must be under cl. 8, and that there is no right to this money where the hiring is determined by the hirer under cl. 14. In asking myself whether this is a penalty or not, I take the first event in which this money is to be paid. Should

> he return the article under cl. (*a*) ? Clause (*a*) provides : " The hirer may terminate the hiring at any time by returning the article to the owners at such address as they may direct at his own risk, cost and expense, but the hirer shall remain liable for rent up to the such return (including apportioned rent for any broken period) and damages, if any, for any breach of this agreement, compensation, if any, under cl. 6 hereof, and also any other moneys then payable under this agreement." Supposing the hirer exercises his right to terminate this hiring, how can it be said that this sum of money, which it is agreed shall be paid, is a penalty or that it is a case in which either the agreed sum or liquidated damages must be paid ? If the hirer terminates this agreement, what right does that give the owner to recover any damages against him ? He has done him no wrong, he has broken no contract, and I am quite unable to see that this sum would or could give a penalty if it were claimable in those circumstances. It appears to me to be a strange conclusion, if this money is to be regarded as a penalty where it was payable in one event and not regarded as a penalty where it was payable in another event. I think, therefore, as it is to my mind not a penalty where it is payable on the return of the article by the hirer, it ought not to be regarded as a penalty where it was payable on the retaking of the article by the owner.

That exactly covers the case I have to consider, and, if that stood alone, I do not think that I should be justified in taking a view on this common commercial document different from that of SALTER, J., from which, as I shall go on to show, no dissent has been expressed by any court whenever the matter has come before the courts. SALTER, J., continued as follows [pp. 112, 113] :

> Then the next case I take is where the money is paid on the determination of the hiring by the owner, not as in this case in consequence of the conduct of the hirer which is a breach of contract, but in consequence of the happening of an event which is not a breach of the contract. For example, supposing the owner justifies his right to retake under cl. 8, because execution has been issued against the hirer. There is no wrong done by the hirer to the owner, and it is no breach of any contract which the hirer has made with the owner. How could that event give to the owner of the goods any right to recover damages against the hirer, liquidated or unliquidated ? It appears to me that no question of penalty could arise in such a case, and if this sum is not a penalty where it is payable on the determination of the hiring by the owner, by reason of the levy of execution, it seems to me it would be a strange result if it were to be held a penalty where it is payable on the termination of the hiring by the owner on the ground of non-payment of rent by the hirer. That is this case. Then there is a third case I take, and that is this one, where the hire is determined by the owner, because the hirer is in arrear with his payments. It is proved that this is a breach of this contract, and it is proved that that breach, apart from any termination of the hirer, would give the owner a right to damages against the hirer. But what would those damages be ? They would be interest on the amount unpaid and nothing more. The fact that the hirer is in arrear with his payments will not entitle the owner to any damages for depreciation of these things. The reason they have suffered is that they have second-hand goods put on their hands before they have received very much money in respect of them. That is not the result of the hirer's breach of contract in being late in his payments ; it is the result of their own election to determine the hiring, and it appears to me, even in this case, there is no question of penalty at all, and there is no question whether the sum paid shall be regarded as liquidated damages or penalty.

Then SALTER, J., goes on to consider what the position would be if he had to choose between penalty and damages—namely, whether it was truly a penalty or a pre-estimate of damage—and comes to the conclusion that the true view is that it would be a pre-estimate of damage. FRASER, J., agreed with what SALTER, J., said.

The next case, *Chester & Cole, Ltd.* v. *Avon* (5), came before HAWKE, J., in May, 1929, and he had brought to his notice the decision of SALTER and FRASER, JJ., in *Elsey & Co., Ltd.* v. *Hyde* (4), which I have just read. Although in *Chester & Cole, Ltd.* v. *Avon* (5) HAWKE, J., did not add anything, it is clear that he approved of the judgment which I have already read.

The next case cited in the volume to which I have referred is *Roadways Transport Development, Ltd.* v. *Browne & Gray* (6), which came before the Court of Appeal in May, 1927. The point to which I have just referred was not taken before that court, which did not have to consider whether in truth this was not a question of penalty or liquidated damages at all. It was to this point as to whether it was a penalty or a pre-estimate of damage that they directed their attention, and the court, consisting of BANKES, SCRUTTON and ATKIN, L.JJ., came unanimously to the conclusion that there was a genuine pre-estimate of damage, and not a penalty. That has no bearing upon the point which I am immediately considering, but it has a considerable bearing upon the view which I should feel bound to take if I came to the conclusion that that was a problem which I had to solve, for, although it is true that there is some distinction to be drawn between the nature of the goods the subject of the hire-purchase agreement in that case and those the subject of the hire-purchase agreement in this case, yet I should regard the decision of the Court of Appeal in *Roadways Transport Development, Ltd.* v. *Browne & Gray* (6) as a valuable guide in the present case. It is, I think, important, although, of course, each case must be judged upon its own facts and upon its own merits, not to be over-subtle in refinement in dealing with commercial documents of this kind, and it appears to me to be undesirable, if the court has come to a certain conclusion in relation to a certain class of goods the subject of a hire-purchase agreement, easily to come to any other conclusion in regard to a different class of goods the subject of another hire-purchase agreement.

I turn to the next and last case cited, *Chester & Cole, Ltd.* v. *Wright* (7), which came before LORD HANWORTH, M.R., and GREER, L.J., sitting as additional judges of the King's Bench Division, constituting a Divisional Court. There it would appear that both points were argued—namely, (i) whether the question of penalty against liquidated damages arose at all, and (ii) if it did, whether it was a penalty or liquidated damages. As I read the judgment of LORD HANWORTH, M.R., he did not deal with the first point, but he came to the conclusion, upon the question of liquidated damages versus penalty, that this was a pre-estimate of damages, and that, accordingly, the payment was enforceable. On that point, GREER, L.J., came, though with difficulty, to the same conclusion, but he expressed himself upon the first point which I mentioned, and I consider what he said as of the gravest importance, if not strictly a binding authority, having regard to the fact that the court came to a conclusion upon the other point. GREER, L.J., said, at p. 130;

> The second question to be determined is a little more difficult: it is whether the sum of £95, diminished by the amounts already paid, is to be deemed to be a penalty for breach of contract, and not damages, or, as may well be, that it is neither one nor the other, that it is neither a penalty nor is it liquidated damages, but it is a sum which in consideration of getting the use of this car, the hirer promised to pay in a certain event, that event being the determination in one way or another of the hiring agreement. There is no reason in law why, for a sufficient consideration, there should

> not be on the same document two contracts, one a contract to hire the motor car on the terms of the agreement, and another, a contract that if that agreement comes to an end, then a certain sum will be payable by the hirer; and it may very well be that the view which is, I think, the view of Salter, J., in *Elsey's* case (4), which was cited before us, is the right way to look at this clause, namely, that it is not either liquidated damages or a penalty, but it is a sum payable in respect of one event, namely, the determination and end of the hiring agreement, whether that end of the hiring agreement arises from the hirer delivering the car back again, or whether it arises from the owner taking it out of the possession of the hirer in the events in which he is entitled to take it out.

At any rate, Greer, L.J., does not dissent from, but rather gives his approval to, the reasoning of Salter, J., in *Elsey's* case (4) in construing an agreement which in no material way differs from that which I have to construe. Accordingly, whatever my own view might be, I should feel bound to give this document the same meaning, and to come to the conclusion that here no question of penalty against liquidated damages arises, that here there is a contract for the payment of a certain sum in a certain event, and that, that event having happened, that sum is payable.

I would only add that, if I had to come to a conclusion on the second question as to whether this was a penalty or a pre-estimate of damages, then, guided by the line of reasoning which influenced the Court of Appeal in *Roadways Transport Development, Ltd.* v. *Browne & Gray* (6), I should come to the conclusion here that this was a case, not of penalty, but of genuine pre-estimate of damage. I have only to add upon this part of the case that, when *Associated Distributors, Ltd.* v. *Hall* (8) came before the Court of Appeal, that court was concerned only with a case where, under such an agreement as this, the hirer himself elected to terminate the agreement, and, in those circumstances, the court, having had cited to them *Roadways Transport Development, Ltd.* v. *Browne & Gray* (6), came to the conclusion that there was no question of penalty or liquidated damages at all. Scott, L.J., was careful to keep open the question of what might be the view of the court if the agreement had been terminated, not by the hirer, but by the owner, but in his judgment there is not one word of disapproval of the reasoning of Salter, J., in *Elsey's* case (4). Accordingly, all four grounds upon which it is sought to reject this proof having failed, I must allow this application and direct the liquidators to admit the proof. The liquidators will pay the costs of this application.

Application allowed. Costs to be paid by the respondents.

Solicitors: *Perowne & Co.* (for the applicants); *Hugh-Jones & Flinn* (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

SWINDON BOROUGH COUNCIL *v.* HERBERT AND OTHERS.

[King's Bench Division (Atkinson, J.), **November 11, 1941.**]

Police—Consolidation of borough and county police forces—Powers to be exercised by police authority—"Police authority"—Police Pensions Act, 1921 *(c.* 31*), s.* 30*, Sched. III—House to House Collections Act,* 1939 *(c.* 44*).*

In the House to House Collections Act, 1939, the expression "police authority " has the same meaning as in the Police Pensions Act, 1921, and by sect. 30 and the third schedule of the latter Act it means, in the case of a borough, the watch committee, except where the context otherwise requires. Under the Municipal Corporations Act, 1882, the control of the police for the borough of Swindon was vested in the watch committee, but, by agreement with the standing joint committee for the county of Wiltshire, the entire government of the police in the borough was handed over to the county authority. On the basis of the above definition, the applicants contended that they were entitled to exercise the powers in the 1939 Act given to the police authority:—

HELD: the definition in the third schedule to the 1921 Act was not conclusive. Upon the proper construction of the Act as a whole, the standing joint committee was, in the circumstances of the case, the police authority to exercise the powers given by the 1939 Act within the borough of Swindon.

[**EDITORIAL NOTE.** This is purely a construction point, but one of considerable practical importance. The police authority of the borough is *prima facie* the watch committee, but, where a borough has, for the convenience of administration, consolidated its police force with that of the county, the effective authority, at any rate for the purposes of the Act here considered, is the county police authority.

AS TO CONSOLIDATION OF COUNTY AND BOROUGH POLICE FORCES, see HALSBURY, Hailsham Edn., Vol. 25, p. 313, para. 512; and FOR CASES, see DIGEST, Vol. 37, p. 185, Nos. 77-81.]

SUMMONS to determine whether the plaintiffs or the respondents (as the Wiltshire Standing Joint Committee) are the authority to exercise certain powers given by the House to House Collections Act, 1939, which by that Act are to be exercised by the police authority. The facts are fully set out in the judgment.

R. M. Montgomery, K.C., and *G. D. Squibb* (for *Erskine Simes*) for the plaintiffs.

Sydney Turner, K.C., and *Valentine Holmes* for the defendants.

ATKINSON, J.: Swindon is a non-county borough. In such a borough, the watch committee normally are, beyond question, the police authority. The County Police Act, 1840, however, permitted boroughs to agree to consolidate their police with the county police. By an agreement made in July, 1902, the borough of Swindon entered into such an agreement with the standing joint committee for the county of Wiltshire. That agreement recited as follows:

> Whereas it has been arranged between the county authority and the borough authority that the police establishments of the said county and borough shall be consolidated . . . (2) The police establishment of the said county and the police establishment of the borough shall be consolidated into one police establishment, provided that the chief constable for the time being of the said county shall have the same power in respect of the appointment promotion and dismissal of constables and otherwise in regard to the general disposition employment and government of the said consolidated police establishment whether within or beyond the limits of the said borough as he has heretofore had in regard to the county police establishment and that he shall not be under any obligation to present any report to the borough authority.

Then the county authority undertook to maintain for service within the borough a police establishment of a certain strength in consideration of an annual payment. The borough parted as completely as possible with its own police force and became a borough which had no police force of its own.

The question arises here in this way. The House to House Collections Act, 1939, s. 11 (1), provides as follows :

> In this Act the following expressions shall have the meanings hereby respectively assigned to them . . . "police area," "police authority" and "chief officer of police" have the same meanings respectively as in the Police Pensions Act, 1921 . . .

One is, therefore, thrown back to the Police Pensions Act, 1921, to see exactly what is meant by "police authority." In the Police Pensions Act, 1921, it is provided by sect. 30 as follows :

> In this Act, unless the context otherwise requires, the expression "police area" means one of the areas set forth in the first column of the third schedule to this Act ; and the expressions "police authority," "chief officer of police" and "police fund" mean, as respects each police area, the authority, officer, and fund respectively mentioned opposite to that area in the second, third and fourth columns of that schedule . . .

Then, coming to the schedule, which is divided up into four columns, as indicated in that section, one sees that the first heading is "police area," the second "police authority," the third "chief officer of police," and the fourth "police fund," and in the column headed "police area" the third to be mentioned is "a county" and the fourth to be mentioned is "a borough." The police authority for a county is the standing joint committee of the quarter sessions and the county council, the chief officer of police in a county is the chief constable, and the police fund is the county fund. Opposite "a borough," under the heading "police authority," comes the watch committee, "a chief officer of police," the chief constable, "police fund," "the borough fund or borough rate or any fund or rate applicable under any local Act for the expenses of the police force."

The argument for the applicants is simply this. Of course, *prima facie*, one must go to the more particular definition. Swindon is a borough, and the police authority for that borough is the watch committee, and, therefore, the argument is that, being referred back to the Police Pensions Act, 1921, if we look at the schedule, we see that the watch committee is the police authority for a borough, and there is an end of the question. However, it is not quite so simple as that, because what one has to refer to in the House to House Collections Act, 1939, is not the schedule in the Police Pensions Act, 1921. The words in the House to House Collections Act, 1939, s. 11 (1) are : "have the same meanings respectively as in the Police Pensions Act, 1921." Therefore, one has to look at the Act as a whole to see what under that Act, in relation to a borough like this, which has parted with its police force, the expression "police authority" means.

Going through the Act of 1921, counsel for the defendants has taken it section by section and has satisfied me that under that Act the police authority could never, in a case like Swindon, be the watch committee. Always it must be the standing joint committee of the quarter sessions and the county council. If he is right about that, in my judgment, that ends the argument. I might go through the Act as he did. The Police Pensions Act, 1921, s. 2 (1), for instance, says that every member of a police force :

> . . . if he has completed 25 years' approved service, and has given three months' written notice, or such shorter notice as the police authority may accept . . . shall be entitled . . . to retire and receive an ordinary pension for life . . .

It is idle to suggest that a constable in the employ of the county satisfies that provision by giving three months' written notice to the watch committee, with which he has nothing to do at all, which does not employ, dismiss or pay him, and to which he does not look for any pension, an authority with which he has nothing whatever to do. Then sect. 16 deals with the penalty for obtaining pensions, and so on, by fraud. It is quite obvious that the authority referred to is the authority which pays the pensions, or, in other words, the standing joint committee. Then sect. 22 deals with the payment of pensions out of the police fund :

> All payments to the members of any police force or their widows, children, and dependants under this Act, or any enactment repealed thereby, and all payments by one police authority to another under this Act or any such enactment, and all other payments which in any enactment are directed to be made out of the pension fund, shall be made out of the police fund . . .

It is absurd to suppose that that section can possibly apply to a case like that of Swindon, where the members of the police force are not in the employ of the borough, where there is no police fund and where there is no pretence at all that the borough is going to make any of those payments. Therefore, it seems to me to be quite plain that, if one is to get at the meaning of "police authority" in the House to House Collections Act, 1939, one has to ascertain what will be that authority, and, if one considers the question arising under the Police Pensions Act, Act, 1921, one is simply driven to the conclusion that the police authority is not the watch committee, but the standing joint committee. The schedule is not conclusive at all. What is clear is that the expression "a borough" in the schedule really must be limited to a borough which has a police authority, a chief officer of police and a police fund. If it has not got those things, it is not "a borough" within the first column, and, if it does not come under the heading of "a borough," it naturally falls under the heading of "a county," which includes any non-county borough. Of course, if a borough has and maintains a police force of its own, the difficulty which arises here is entirely removed.

I am satisfied that the answer to the question asked by this summons as to whether the claim by the borough of Swindon that the watch committee of the council is the police authority for the purposes of the House to House Collections Act, 1939, is in the negative.

Declaration accordingly. Judgment for the defendants with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *D. Murray John*, Town Clerk, Swindon (for the plaintiffs) ; *Radcliffe & Co.*, agents for *P. A. Selbourne Stringer*, Clerk to the Wiltshire Standing Joint Committee (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

OPPENHEIMER *v.* MINISTER OF TRANSPORT.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Humphreys and Asquith, JJ.), **October 14, 15, November 25, 1941.**]

Compulsory Purchase—Compensation—" Interest in land "—Option to purchase —Lands Clauses Consolidation Act, 1845 (*c.* 18), *ss.* 18, 49, 63, 68.

For the purpose of the construction of a new road, the Minister of Transport compulsorily acquired part of three fields, for which the owner was duly compensated. The claimant was the owner of a residential property which adjoined the fields in question, but not the part of them taken for the road. In 1931, he had purchased the residential property from the owner of the fields, and had obtained an option exercisable within 10 years from July 24, 1930, to purchase the fields for £1,500, and this option was duly registered as an estate contract in the Land Charges Register. In 1938, he was served with a notice to treat as being a person interested in the land to be acquired by the Minister. Up to that date, he had not exercised his option to purchase. The value of the land taken was assessed in accordance with the provisions of the statute at less than £1,500, the sum which the claimant would have had to pay for it if he had exercised his option. The questions considered by the court were whether the claimant's option was an interest in land within the meaning of the Lands Clauses Consolidation Act, 1845, for which he would be entitled to compensation, and whether the residential property could be said to be held with the lands in question so as to support the claim for injurious affection :—

HELD : (i) on the true construction of the Lands Clauses Consolidation Act, 1845, the option gave the claimant an interest in the land in respect of which he would be entitled to compensation if it were compulsorily acquired.

(ii) the residential property in respect of which the claim for injurious affection was made was held with the lands compulsorily acquired within the meaning of the Lands Clauses Consolidation Act, 1845, s. 49.

[**EDITORIAL NOTE.** The decision in this case can for practical purposes be quite shortly stated in these words. An option to purchase land is an interest in land within the meaning of those words in the Lands Clauses Consolidation Act, 1845, s. 18. It may be necessary to add that the option should be registered as a land charge, but registration can make no difference in the nature of the interest, and it is probably the better view that the matter of registration can only affect the amount of compensation. In coming to its conclusion the court has, to a great extent, relied upon the judgment in *London & South Western Ry. Co.* v. *Gomm* (1), but that, it must be remembered, was a decision upon a different section and one inserted with a very different purpose. The legislature has always insisted that promoters of undertakings shall renounce the ownership of superfluous land. The Act says that they shall absolutely sell and dispose of all such land. The inclusion in the conveyance of superfluous lands of a covenant to repurchase at any time might well have been *ultra vires* the section without the covenant itself creating an interest in land. In any case the covenant, as drafted, was void as offending against the perpetuity rule. It seems a long step from that to a decision that an option to purchase is an interest in land for which promoters must pay compensation. The contention of the promoters was that this was a mere personal right. The answer to that seems to be that an owner of land who has given such an option cannot, when notice is served exercising the option, refuse to convey the land and offer to pay damages for non-fulfilment of the option. Further, in the case of a registered option, no subsequent purchaser of the land could refuse to be bound by it, since he must have bought with notice of it. The only person who could refuse to be bound by the option would be a subsequent purchaser for value without notice—a case which could arise only where the option was not registered and did not appear on the title. That a right can be specifically enforced against a purchaser with notice and not against a purchaser for value without notice are the characteristics of an equitable interest and appear to show that the option here in question was an equitable interest in land and a proper matter for compensation.

As to Persons Entitled to Compensation, see HALSBURY, Hailsham Edn., Vol. 6, pp. 39-41, para. 36; and for Cases, see Digest, Vol. 11, pp. 123, 124, Nos. 148-155.]

Cases referred to:

(1) *London & South Western Ry. Co.* v. *Gomm* (1882), 20 Ch.D. 562; 40 Digest 305, *2617*; 51 L.J.Ch. 530; 46 L.T. 449.

(2) *Re Cant's Estate* (1859), 4 De G. & J. 503; 11 Digest 246, *1458*; 28 L.J.Ch. 641; 33 L.T.O.S. 280.

(3) *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180; 11 Digest 279, *2067*; 38 L.J.Q.B. 98; 19 L.T. 681.

(4) *Thicknesse* v. *Lancaster Canal Co.* (1838), 4 M. & W. 472; 11 Digest 136, *230*; 8 L.J.Ex. 49.

(5) *Macey* v. *Metropolitan Board of Works* (1864), 3 New Rep. 669; 11 Digest 143, *273*; 33 L.J.Ch. 377; 10 L.T. 66.

(6) *Clark* v. *London School Board* (1874), 9 Ch. App. 120; 11 Digest 137, *233*; 43 L.J.Ch. 421; 29 L.T. 903.

(7) *Cowper Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153; 11 Digest 135, *216*; 58 L.J.Q.B. 597; *sub nom. Essex* v. *Acton District Local Board*, 61 L.T. 1.

Special Case Stated by the Official Arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). As authorised by the Trunk Roads Act, 1936, the Minister of Transport, pursuant to the Berkshire County Council Act, 1937, a private Act incorporating the provisions of the Lands Clauses Consolidation Act, 1845, compulsorily acquired part of three fields and duly compensated their owner. The claimant, the owner of an adjacent property, had an option to purchase the fields within 10 years from July 24, 1930, which option he had not exercised at the date of the notice to treat. He claimed compensation, on the ground that his residential property was held with the land over which he had the option, and that it would be injuriously affected by the construction of the road.

Sydney Turner, K.C., and *Harold Williams* for the claimant.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Valentine Holmes* for the respondent.

Viscount Caldecote, L.C.J.: A question of some difficulty arises upon an award stated in the form of a special case by the Official Arbitrator, the late Sir Hugh Webster, under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). By a conveyance, dated Feb. 2, 1931, the claimant bought for the sum of £6,000 the freehold of a small property known as Weir Bank, including a dwelling-house. The vendor of the property owned the freehold of three fields immediately adjoining Weir Bank, which I will call the option fields. The claimant made it a condition of his purchase that for 10 years from July 24, 1930, he should have an option to buy the fields for the sum of £1,500. It is found by the arbitrator that the claimant would not have purchased Weir Bank unless he had at the same time secured the option. The option was duly registered as an estate contract under the Land Charges Act, 1925, s. 10 (1) (C) (iv). In pursuance of a scheme for making a new trunk road, the Minister of Transport required to take a part of each of the three option fields, and on Oct. 7, 1938, the Minister, exercising his powers under the Berkshire County Council Act, 1937, which incorporated the Lands Clauses Consolidation Act, 1845, gave a notice to treat to the claimant in respect of the land he so wished to acquire. At the date of the notice, the claimant had not exercised his option. The land required by the Minister does not at any point abut on the claimant's land.

In due course, the claimant made a claim for compensation under three heads. First, he claimed in respect of his interest in the land taken as holder of the option over the freehold. His claim was for the value of the land after deducting the price payable therefor by the claimant under his option. Secondly, in respect of the injurious affection of that part of the option fields which was not taken, he claimed the depreciation in value owing to the works. Under the third head, he claimed as beneficial owner of the freehold of Weir Bank, in respect of injurious affection thereto due to construction of works and user, the depreciation in value of the property. Only the third of these claims now arises directly for our consideration, the arbitrator having found that, as at the date of the notice to treat, the value of the option fields estimated in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, did not exceed £1,500. The point of law submitted for the opinion of the court by the special case is whether the claimant is entitled to any compensation under the third head of his claim.

There can be no doubt that, if the claimant had exercised his option before the notice to treat was served upon him, he would have been entitled to be paid the full value of the strip of land taken by the Minister as well as compensation for the injurious affection of his land held therewith. The option not having been exercised, the claimant's case is that his option was land or an interest in land for the purposes of the Lands Clauses Consolidation Act, 1845, and that he is a party entitled to compensation in respect of land taken. From this it would follow that the claimant is entitled to compensation for injury done to the lands held therewith: Lands Clauses Consolidation Act, 1845, s. 49.

The claimant has first to establish the contention that his option to buy the fields was land or an interest in land for the purposes of the Lands Clauses Consolidation Act, 1845. The fact that the Minister of Transport gave notice to the claimant, as a "party interested in such lands" (sect. 18), of his intention to take part of the option fields is not conclusive, though the words themselves which I have quoted from sect. 18 are material as showing the subject of compensation under the Act. Sect. 3, which is a definition section, throws no light upon the question. Sect. 21 deals with the method of settling the amount of compensation to be paid "for the interest in lands belonging to" a claimant. Sect. 23

requires a notice stating " the nature of the interest " in respect of which compensation is claimed. Sect. 68, which is a machinery section, comes into operation :

> If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction . . . A

That the claimant had an " interest," in the ordinary and natural sense of the word, in the option fields during the currency of the option seems plain. It was, moreover, an interest of such a nature as to be capable of registration as a charge on the option fields under the Land B Charges Act, 1925. Further, the right to call for a conveyance of land has been held to be an equitable interest or equitable estate. As was said by Sir George Jessel, M.R., in *London & South Western Ry. Co.* v. *Gomm* (1), at p. 581 :

> A person exercising the option has to do two things, he has to give notice of his C intention to purchase, and to pay the purchase money ; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

For all purposes under the Lands Clauses Consolidation Act, 1845, I think, an interest in land is land. It is not possible to find any one D clear indication in the elaborate provisions of the Lands Clauses Consolidation Act, 1845, that this is true, but I think that it is a correct conclusion from the whole of the Act. Any person having an interest, either a freeholder or a person holding some less interest in the land in question, is intended to be entitled to compensation in one form or E another in respect of his interest, whatever it is, if it is compulsorily taken from him. So much was scarcely disputed by the Solicitor-General on behalf of the Minister of Transport, though he was not prepared to admit the claimant's contention, particularly on the ground that, as the Solicitor-General submitted, the option was merely personal to the F claimant. The main argument on behalf of the Minister was that no land or interest in land of the claimant had been taken. Such as the claimant's right was, it had merely been rendered incapable of exercise in circumstances which gave no right to any compensation. It had, in fact, seen destroyed by the Minister's exercise of powers given him by Parlia- G ment. It was said by counsel for the claimant that a similar argument was submitted and rejected in *Re Cant's Estate* (2). The facts of that case were that a testator by his will gave one of his sons a right of preemption of certain hereditaments for a named sum after the death of the testator's widow. Before that event happened, the hereditaments in H question were compulsorily acquired by a railway company, and the purchase money was invested. When the testator's widow died, the son claimed so much of the invested fund as represented the hereditaments on paying the stipulated price. Stuart, V.-C ' held that the right of pre-emption had become extinguished by the conveyance to the railway company On appeal to the Lords Justices, this decision was reversed, on the ground that the right of pre-emption remained unaffected by the Act. I doubt whether any guidance is to be found from this decision, which turned upon the view taken by the Lords Justices as to the nature of the fund in court.

The decision in *Baily* v. *De Crespigny* (3) to the effect that a covenantor is discharged from his covenant if an Act of Parliament puts it out of his power to perform it was relied upon by the Solicitor-General, but it seems to me remote from the question we have to decide. Here it is true to say that the condition binding the vendor of Weir Bank to convey the option fields to the claimant upon payment of the agreed sum became impossible of performance by the vendor, but, none the less, it may be the case that the interest held by the claimant arising out of the covenant has been taken by the Minister of Transport so as to require him to pay compensation for it.

Although we were not referred to, and I have not been able to find, any case in which this question has arisen on similar facts, I hold the opinion that this is the right view. The plain fact is, as it appears to me, that the Minister has taken the land in which both the owner of the freehold and the claimant, by virtue of his option, have an interest. Why should one be entitled to be paid for what he loses and not the other ? I can see no distinction in principle between the two cases. If one plays with the words, it may be one way of describing the facts to distinguish this case on the ground that the interest of the claimant has been destroyed. The truth is, however, that the freehold was no use to the Minister unless the claimant's option came with it. Even assuming that it is right to say that the option was destroyed, I see no reason to infer from this that the claimant's interest was not taken. To hold that it was not taken would, I think, be a denial of the substance of the transaction, and contrary to both common sense and the intention of the Lands Clauses Consolidation Act, 1845.

The three cases concerning easements to which we were referred—namely, *Thicknesse* v. *Lancaster Canal Co.* (4), *Macey* v. *Metropolitan Board of Works* (5) and *Clark* v. *London School Board* (6)—are different in principle. A purchaser of land over which there is a right in the nature of an easement does not necessarily want to interfere with the easement. If and when he does interfere with it, then compensation is to be paid in respect of the injury suffered by the person entitled to the easement. It is not a case of the acquisition of the easement, but only of the dominant tenement. The option to purchase in the present case is wholly different. The moment the Minister takes the freehold, at the same time, it seems to me, he must take the claimant's interest, because otherwise his purchase of the freehold would not serve his purpose.

The remaining question is whether, on the assumption that the Minister has taken land belonging to the claimant, the claimant can claim compensation in respect of injurious affection of Weir Bank. This depends on whether Weir Bank is held with the land taken. Applying the test laid down by Lord Watson and Lord Macnaghten in *Cowper Essex* v. *Acton Local Board* (7), at pp. 167, 175, I am of opinion that Weir Bank, in respect of which the claim for injurious affection is made, is held with the lands to be purchased within the meaning of the Lands Clauses Consolidation Act, 1845, s. 49. I would therefore answer the question submitted to us in the affirmative.

Humphreys, J.: I am of the same opinion, and I do not think that I can usefully add anything.

Asquith, J.: I concur entirely in the judgment delivered by my Lord, and will only summarise the grounds of my decision.

First of all, the Lands Clauses Consolidation Act, 1845, appears to draw no distinction between an interest in land and land itself. Secondly, it is conceded by the Solicitor-General on behalf of the respondent that, for the purposes of the Act and of this case, there is no material distinction between a legal interest in land and an equitable interest. Thirdly, *London & South Western Ry. Co.* v. *Gomm* (1) decides that the holder of an option over land has an equitable interest in that land, and that he is, therefore, entitled to land or its equivalent. Fourthly, if someone is entitled to land, and that land is taken, with the consequence that other land held with it is injuriously affected, the person entitled to the first can claim compensation for injurious affection to the second by reason either of the execution of such works or of their user. In the present case, a part of what have been called the option fields has, in my view, been taken by the Minister of Transport. The claimant's interest in those fields consisted in a right to require, subject to certain conditions as to notice and tender, the fee simple therein to be transferred to him. The expropriating Minister has required that interest to be transferred to him. This amounts, in my view, not merely to an extinction of the claimant's rights, but to the absorption, the appropriation and the transfer of those rights (or, at all events, of something which includes those rights) to the Minister. What the claimant has lost, the Minister has gained, and, in those circumstances, the conclusion is irresistible that he has taken the land of the claimant.

This seems to me to conclude in favour of the claimant the issue raised by the special case. I only add two or three sentences in reference to certain contentions upon which the Solicitor-General relied. Much reliance was placed by him on *Baily* v. *De Crespigny* (3). This case seems to me to decide directly no more than that, if A and B have a contract in relation to land, and later that land is acquired by an authority acting under statutory powers, that contract is frustrated. It decides nothing as between either contracting party and the expropriating authority, and it is with their rights *inter se*, and their rights alone, that the case is concerned. Then, again, it was submitted that the option vested in the claimant was a right personal to himself, the suggestion being, I suppose, that such a right is more easily destroyed than another.

If this means—and I can think of no other relevant meaning—that it was merely contractual, and not a proprietary right, then it appears to me that *London & South Western Ry. Co.* v. *Gomm* (1) is an authority to the contrary.

Lastly, reliance was also placed on cases referred to by VISCOUNT CALDECOTE, L.C.J., in which lands were taken which were subject to easements. Assuming an easement for this purpose to be an interest in land, what was taken in those cases was not an easement, but was the land subject to the easement, and, therefore, the bearing of those cases on the question before this court is very remote. For these reasons, I am of opinion that the question raised in the special case ought to be resolved in the manner indicated by my Lord.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the claimant); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re CAIDAN, OFFICIAL RECEIVER *v.* REGIS PROPERTY CO., LTD.

[CHANCERY DIVISION (Morton, J.), **October 20, November 10, 11, 1941.**]

Bankruptcy—Preferential claims—Distress by landlord—Right of trustee in bankruptcy to receive proceeds of distress—" Landlord or other person "—Bankruptcy Act, 1914 (*c.* 59), *s.* 33 (4).

A receiving order was made against the debtor in 1939, and on the same day she was adjudicated bankrupt. Some days before the receiving order was made, a certificated bailiff, acting on behalf of the landlords, distrained for rent on goods which were the property of the bankrupt. The distress was carried out on premises let to the bankrupt's husband, but on which she carried on business. The trustee in bankruptcy claimed moneys realised on the sale of these goods, on the ground that *a* charge was created in his favour by the Bankruptcy Act, 1914, s. 33 (4):—

HELD: (i) the trustee was entitled to enforce this charge.

(ii) the "landlord or other person" referred to in the subsection is the person on whose authority the distress is levied, and not the bailiff through whom the distress is made.

(iii) the charge arises on the making of the receiving order.

(iv) the charge is a charge on the goods in the hands of the bailiff at the time when the receiving order is made.

(v) the charge is not confined to the case where a landlord distrains on the goods of his tenant, and the term " other person " would include the respondents, who, therefore, come within the operation of the section.

[**EDITORIAL NOTE.** From its nature a landlord's power of distress places him in a very strong position on the bankruptcy of the tenant and the law has placed certain restrictions upon its exercise. These restrictions are now dealt with in the Bankruptcy Act, 1914, s. 35. The matter here considered does not arise out of that section. Apart from those general restrictions upon distress, it was felt that further restrictions were necessary in order to equalise the position between preferential creditors and the landlord. These further restrictions are enacted in sect. 33 (4). Though the matter is not so stated in the section, it will be evident that these restrictions do not arise unless the assets, apart from goods distrained or the proceeds of their sale, are insufficient to provide for the costs of the bankruptcy and the preferential debts. Where there is such a deficiency of assets, the landlord is required to bring in the proceeds of any distress levied within the 3 months preceding the receiving order to a common fund consisting of the assets of the bankrupt and the proceeds of the distress. Out of this fund the costs of the bankruptcy have to be provided, and then it is distributed among the preferential creditors and the landlord *pari passu*, the landlord, however, only being allowed to share in the common fund in respect of the amount he has brought in as the proceeds of sale of the distress. That appears to be the effect of the subsection here considered. The legislature has chosen to give effect to this intention in a rather roundabout way, for which, however, there may be a perfectly good reason, and it is with the construction and effect of the wording of the subsection that the present decision is concerned The decision, important because the matter has not hitherto been discussed, has adopted a construction in harmony with the general view of bankruptcy practitioners as to its meaning and effect.

As to Preferential Claims as a Charge on Goods Distrained, see HALSBURY, Hailsham Edn., Vol. 2, p. 291, para. 385. See also HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 1, p. 639.]

Motion by the Official Receiver asking for a declaration that the proceeds of sale of certain goods the property of the bankrupt, Esther Rosa Caidan, should be paid to him by the respondents. The facts are fully set out in the judgment.

W. A. L. Raeburn for the applicant.

H. J. Astell Burt for the respondents.

Morton, J.: In this case, I have to decide certain questions which arise as to the effect of the Bankruptcy Act, 1914, s. 33 (4). Both counsel for the applicant and counsel for the respondent assure me that, after a careful search, they have been unable to find any authority dealing with these questions.

The applicant is the Official Receiver, the trustee of the property of Esther Rosa Caidan, bankrupt, and the respondents are the Regis Property Co., Ltd. The applicant seeks by the notice of motion a declaration and an order for payment by the respondents to the applicant of the sum of £50 or such other sum as shall be found to be the net amount of the proceeds of sale of certain goods and effects of the bankrupt distrained by the respondents within three months next before the date of the receiving order made in this case. Then he asks for all proper and necessary accounts and inquiries, such further or other relief as to the court may seem fit, and costs. I think that it is convenient that I should read the relevant portions of sect. 33 and state the questions which arise thereon before stating the facts of this particular case. Sect. 33 (1) provides as follows:

> In the distribution of the property of a bankrupt there shall be paid in priority to all other debts . . .

Then follow, under separate sub-headings, a number of specified debts. I think that the opening words of the section are of some importance in regard to the questions which I have to consider. The person who is to pay these debts in priority to all other debts is clearly the trustee in bankruptcy, and he is to do it in the distribution of the property of the bankrupt. Subsect. (2) provides as follows:

> The foregoing debts shall rank equally between themselves and shall be paid in

> full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

Subsect. (3) provides as follows:

> Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor is sufficient to meet them.

Subsect. (4), which is the subsection which I have to construe, goes on to deal with certain property and money on which a charge is given:

> In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt within three months next before the date of the receiving order the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof: Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

The questions which arise on this subsection were conveniently stated by counsel for the respondents as follows. (i) Who is the person who can enforce the charge created by this subsection? (ii) Against whom can the charge be enforced? (iii) When does the charge arise? (iv) What is the effect of the charge? (v) Does the charge arise when the bankrupt is not the tenant of the premises where the distress was levied, or is it limited to the case of a landlord distraining on the goods of his tenant?

The facts of the case are these. A receiving order in bankruptcy was made against the debtor on her own petition on Feb. 21, 1939, and she was on the same day adjudged bankrupt. On Mar. 7, 1939, it was ordered that the estate of the bankrupt be administered in a summary manner, pursuant to the Bankruptcy Act, 1914, s. 129, and the Official Receiver became, and is still, *ex officio* the trustee of the property of the bankrupt. The preferential debts unprovided for exceeded £50.

It is stated in the affidavit of the Senior Official Receiver that at all material times the bankrupt occupied the premises No. 86, Brompton Road, in the county of London, of which premises the respondents were the landlords, but that is amplified and corrected by the affidavit of Wiggett filed on behalf of the respondents on Oct. 20, 1941. Wiggett says:

> 3. The premises 86 Brompton Road referred to in the said affidavit [of the Senior Official Receiver] were demised to D. Caidan, the husband of the bankrupt, from Sept. 29, 1935, for a minimum term of 14 years. 4. As at Dec. 25, 1938, the said D. Caidan owed to the respondent the sum of £418 18*s*. in respect of the rent of the said demised premises . . . 9. The lease of 86 Brompton Road, granted to the said D. Caidan was never assigned to the bankrupt and so far as the respondents are aware the occupier of the said premises was the said D. Caidan, although the bankrupt, the wife of the said D. Caidan, carried on a business thereat.

On Feb. 10, 1939, eleven days before the date of the receiving order, one W. H. Armitage, a certificated bailiff, levied a distress at 86, Brompton Road, in respect of the arrears of rent due from D. Caidan to the respondents. The distress was levied pursuant to instructions given to Armitage by agents of the respondents, a company called Plus Flats Management, Ltd. Under the distress, Armitage seized certain dresses, coats, costumes and fittings, and, as I read the evidence, there is no dispute that these articles which were on the premises demised to D. Caidan were the £30 after Feb. 21, 1939—that is, after the date of the receiving order—

property of the bankrupt. The case has been argued upon that footing. The articles in question were sold by the bailiff, who received a sum of and a further sum of £20 at a date which appears to be subsequent to the date when he received the £30. There was at one time some doubt as to the precise amount of the proceeds of sale, but it has been agreed between the parties that the net proceeds of sale, received by the respondents in the manner which I shall mention shortly, were £50, and it would appear from the evidence that the goods in question were actually in the possession of the bailiff at the date of the receiving order. As regards the proceeds of the sale, para. 8 of Wiggett's affidavit is as follows :

> From time to time Plus Flats Management, Ltd., account to the respondents for moneys which they collect on the respondent's behalf in and about the management of properties belonging to the latter. In the settlement of account as between the respondents and Plus Flats Management, Ltd., account was taken of the net amount of the proceeds of the said distress and also of the proceeds of sale of the said fixtures and fittings, but no specific amount was paid to the respondents in respect of the said items or either of them.

To summarise what appears to be the agreed effect of the evidence, the net figures representing the proceeds of the distress were £50. These were proceeds of sale of the bankrupt's goods and they were credited in account to the respondents. These proceeds were received after the date of the receiving order and adjudication. The goods were in the hands of the bailiff at the date of the receiving order, and, in my view, by reason of the charge created by sect. 33 (4), the sale took place subject to the liability of someone—for the moment I leave open the question who that someone is—to account in respect of the amount charged upon these goods by sect. 33 (4).

I now turn to the five questions which I have already stated in the words of counsel for the respondents. As regards the first question, "Who is the person who can enforce the charge ?" I prefer to put it in these words, "Can the trustee in bankruptcy enforce the charge ?" because that is the question I have to determine. In dealing with this part of the case, counsel for the respondents relied very strongly upon the proviso to subsect. (4). He submitted that the first part of the subsection left open the question of who was entitled to enforce the charge, but that the wording of the proviso made it plain that the only persons who could enforce the charge were the priority creditors. He pointed out that the words are "in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made," and he suggested that the words "the person" are inappropriate as applied to the trustee in bankruptcy, because the trustee in bankruptcy as such has no rights of priority. The proviso contemplates, he says, that a sum shall be paid by the landlord or other person to someone who has priority. I feel the force of that argument, and I do not think that the language of the subsection is very happy, but I think that the answer to the argument of counsel for the respondents is that the legislature contemplates that the person paying the money under the charge is paying it through the trustee in bankruptcy to the priority creditors. I think that the words of the proviso are quite open to the construction that the payment may be made to the trustee in bankruptcy and that this construction of the subsection has the advantage of making the subsection fit into the general scheme of the Act and the general scheme of this section. In my view, the trustee in bankruptcy can enforce this charge. He is the person through whom the priority creditors are paid, under subsect. (1), and I think it is important to note that all the debts generally to which priority is given by the section are charged upon the goods or effects, or the proceeds of sale thereof, by subsect. (4). These debts as a whole are to be a first charge on the goods and effects or the proceeds of sale, and it seems to me natural that the trustee in bankruptcy should be the person to enforce the charge with a view to paying those debts. A curious and inconvenient position would arise if the priority creditors, and they alone, had power to enforce the charge. Counsel for the applicant pointed out some of the difficulties which would arise. He asked how any one priority creditor could enforce the charge. All the priority debts rank *pari passu* under subsect. (2), and he suggested that any individual creditor seeking to enforce the charge would be met with the objection : " You are entitled to a rateable amount only." He submits that it would be contrary to the whole plan of the bankruptcy legislation if, for example, in the present case there were six priority creditors for £50 each and the first of them could come and claim the whole fund. He submits further that it would be highly inconvenient for the court to attempt to decide what rights any individual priority creditor had against the chattels or the proceeds of sale in the absence of the trustee in bankruptcy or in the absence of all the priority creditors. At the time when an application is made to the court to enforce a charge, it may not have been determined who the priority creditors are, and it may be necessary for the creditor applying to satisfy the court by evidence as to the total amount of the priority debts. I do not think that it is necessary, and I do not think that it would be right, to decide on this application whether or not the individual priority creditors are wholly excluded from seeking to enforce the charge, but, in my view, whatever rights of enforcing the charge may or may not be vested in the individual creditors, the trustee in bankruptcy is entitled to enforce it, for the reasons which I have indicated. I should add that I might have felt more difficulty in arriving at this conclusion if the priority creditors had been subdivided into different classes, each class having a different priority. In that event, difficulties might have arisen under the words " shall have the same rights of priority as the person to whom such payment is made." However, as the priority creditors all rank equally between themselves, no such difficulties arise, and I see no difficulty in regarding the payment referred to in the proviso as being a payment to the priority creditors through the trustee in bankruptcy.

The second question is : " Against whom can the charge be enforced ? " Counsel for the respondents suggests that in the present case the person against whom the charge can be enforced is the bailiff, and that the wrong party has been made a respondent to this motion. He points out that, in the present case, and in all other cases when the landlord is a company, the distress is carried out by a bailiff and the proceeds of sale reach the hands of the bailiff in the first instance. He suggests that the words " In the event of a landlord or other person distraining or having distrained " are apt to include a bailiff. I do not take that view. In my view, the bailiff distrains merely in the capacity of an agent for the person levying the distress. This is so stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 10, p. 493, and I see no reason to doubt that the statement is correct. Further, from a practical point of view, I cannot conceive that the intention of the legislature by this subsection was to treat the bailiff as being the person distraining or having distrained in every case in which a bailiff was employed for the purpose. If that were the intention of the section, the result in the present case would, I suppose, be—and counsel for the respondents submitted that it was the result—that the bailiff, having got goods in his hands which were subject to a charge by reason of the receiving order, would be personally liable for having sold the goods, received the proceeds, and, in effect, paid them over to the respondents. I cannot think that that was the intention. In my view, the " landlord or other person " referred to in the section is the principal on whose instructions the distress is levied, and not the agent through whom the distress is actually carried out.

The third question, " When does the charge arise ? " seems to admit of only one answer. I think that the charge arises on the making of the receiving order. The position is a very curious one, because, if that be the interpretation of the section, as I think it is, any landlord or other person distraining will not know whether or not the person whose goods are taken under the distress will have a receiving order made against him or her within the next three months, and, if a receiving order is made, then this charge comes into existence. It may be that this involves some hardship, but it seems to me to be the effect of the subsection.

As regards the effect of the charge, which is the fourth question, I think that the meaning of the words " shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof " is not very easy to define in all the cases which might possibly arise, but I am concerned to define the effect in the circumstances of the present case, which I have already stated. In my view, the effect is that, on the making of the receiving order, the charge came into existence, and was a charge upon the goods and effects in the hands of the bailiff. The respondents are liable to pay to the trustee in bankruptcy a sum equivalent to the amount of the proceeds of sale, because they have in effect received the proceeds of sale, instead of these proceeds being received by the person in whose favour the charge arose.

As regards the fifth question, counsel for the respondents submitted that the charge arose only in a case in which a landlord distrained on the goods of his tenant. I cannot take that view. I think that it is impossible to accede to this argument, having regard to the use of the words "a landlord or other person." To my mind, it is plain that the respondents in this case are either a landlord or "other person" within the meaning of the section. It is true that the respondents are not the debtor's landlords, but they were at the time of the distress landlords distraining on goods which were upon the property demised to their tenant. It is not necessary, however, to decide whether or not they are a landlord within the meaning of the section, because, in my view, it is abundantly clear that they come within the words "a landlord or other person." In that connection, it is to be noted that sect. 35 begins with the words:

> The landlord or other person to whom any rent is due from the bankrupt . . .

The insertion of the words "to whom any rent is due from the bankrupt" in sect. 35 and their omission from sect. 34 seem to me to make it still more plain that a person in the position of the respondents in the present case comes within the wording of sect. 33 (4).

The result is that, in my view, the respondents having distrained on goods or effects of the bankrupt within three months next before the date of the receiving order, the debts to which priority is given by sect. 33 (1) were a charge on such goods and effects. For the reasons which I have already indicated, the trustee is a proper person to enforce the charge, the respondents are the proper persons against whom the charge should be enforced, and, in the circumstances of the present case, the respondents are liable to pay to the trustee in bankruptcy the sum of £50. I have already intimated the precise form of the declaration which I propose to make to give effect to my decision, and I am prepared to make that declaration and to make also an order that the respondent company do pay to the applicant the sum of £50.

Declaration that the applicant is entitled to be paid by the respondents the sum of £50, *being the sum agreed to be the equivalent of the net proceeds of the sale of the goods and effects of the bankrupt distrained by the respondents within three months next before the date of the receiving order made in this case. Costs to be paid by the respondents.*

Solicitors: *Tarry, Sherlock & King* (for the applicant); *Wedlake, Letts & Birds* (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

MOUNTAIN *v.* BERMONDSEY BOROUGH COUNCIL.

[King's Bench Division (Hilbery, J.), **November 3, 11, 1941.**]

Public Authorities—Limitation of actions—Action for fees as registration officer—Limitation Act, 1939 (*c.* 21), *s.* 21.

The plaintiff became town clerk of the defendant borough in 1933, an appointment which he held until 1939. During his term of office, he performed the duties of registration officer for that area in accordance with the provisions of the Representation of the People Act, 1918, s. 12. During that period registration expenses properly incurred amounted to £986 11*s.* 11*d.*, which the plaintiff sought to recover from the defendants under sect. 15 of the Act. The writ was issued more than one year after the completion of the register for 1939. The defendants contended that the claim was statute-barred by reason of the provisions contained in the Public Authorities Protection Act, 1893, and the Limitation Act, 1939, but it was argued on behalf of the plaintiff that this was a claim on a specialty, for which the period of limitation was 12 years :—

Held : the cause of action upon which the plaintiff must rely was the defendants' neglect or failure to perform a statutory duty to pay. Consequently, the Limitation Act, 1939, s. 21 (1), applied, and the claim was statute-barred.

[**EDITORIAL NOTE.** It was argued in this case that this was a claim under a specialty, but that contention is now clearly excluded by the proviso to the Limitation Act, 1939, s. 2 (3). The only real issue, therefore, was whether the payment was an act done in pursuance or execution of an Act of Parliament. On this point, the judge has applied the decision in *McManus* v. *Bowes* (1) and has decided that the case is within the Limitation Act, 1939, s. 21, better known as the Public Authorities Protection Act, 1893, s. 1, although the period of limitation was by the later Act extended to one year.

As to Acts Protected by the Public Authorities Protection Act, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 293-297, paras. 611-616 ; and for Cases, see DIGEST, Vol. 38, pp. 106-112, Nos. 761-795.]

Cases referred to :

(1) *McManus* v. *Bowes*, [1938] 1 K.B. 98 ; [1937] 3 All E.R. 227 ; Digest Supp. ; 107 L.J.K.B. 51 ; 157 L.T. 385.

(2) *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J.P. 483 ; 38 Digest 109, *780*.

Action for fees due to the plaintiff as registration officer of the parliamentary borough of Bermondsey. The facts are fully stated in the judgment.

R. M. Montgomery, K.C., and *Harold Williams* for the plaintiff.

N. L. C. Macaskie, K.C., and *F. W. Beney* for the defendants.

Hilbery, J. : The plaintiff's claim is to recover under the Representation of the People Act, 1918, s. 15, seven sums amounting in all to £986 11*s.* 11*d.* The plaintiff claims these sums as his charges as registration officer payable by the defendant borough under the express provisions of this section of the Act. The defendant borough pleads that the claim is barred by the provisions of the Public Authorities Protection Act, 1893, and the Limitation Act, 1939. A second plea which was raised by the defence and faintly argued at the trial was that the sums claimed were sums for which the plaintiff would be accountable, and which, if recovered, would have to be paid back to the defendant borough. If, however, the first plea is good in law, there is no need to decide the second contention. I therefore proceed to consider whether or not the claim is statute-barred.

In 1933, the plaintiff was appointed town clerk of the borough of Bermondsey. The registration area in Bermondsey is a parliamentary A borough and is co-terminous with, or wholly contained in, the municipal borough of which the defendants are the mayor and corporation. In these circumstances, under the Representation of the People Act, 1918, s. 12, the plaintiff, as the town clerk of the borough, became the registration officer for that registration area, and became bound, under pain of B prosecution and fine, to perform the duties of registration officer imposed on him by sect. 13 of that Act. By sect. 15 of the same Act, it was provided as follows:

> (1) Any expenses properly incurred by a registration officer in the performance of his duties in relation to registration, including all proper and reasonable charges for trouble, care and attention in the performance of those duties . . . (in this C Act referred to as registration expenses) shall be paid by the council whose clerk the registration officer is, or by whom he is appointed . . . Any such expenses shall be paid . . . in the case of the council of a borough out of the borough fund or borough rate . . . (2) The Treasury may frame a scale of registration expenses applicable to all or any class or classes of those expenses, and may alter the scale as and when they think fit.
>
> Any expenses incurred by the registration officer of a class to which the scale is applicable shall be taken to be properly incurred if they do not exceed the maximum D amount determined by or in accordance with the scale . . . (3) Any fees or other sum received by the registration officer in respect of his duties as such officer, other than sums paid to that officer in respect of his registration expenses, shall be accounted for by that officer and paid to the credit of the fund or rate out of which the expenses of that officer are paid . . .

By S.R. & O., 1931, No. 194, what was therein called "Scales of E Registration Expenses for England and Wales, framed by the Treasury, Apr. 1, 1931, under the Representation of the People Act, 1918, s. 15, applicable to the 1931 Register and subsequent Registers prepared under the Act" was brought into force. By this order, in the case of parliamentary boroughs in London, there is a scale provided of (*a*) registration officers' F fees (including payments to deputies), and (*b*) registration officers' allowances in respect of the employment of clerks, canvassers, and so forth. In each case, the amounts payable are calculated on the number of the electors in the registration area.

In each of the seven years 1933 to 1939, the plaintiff, as town clerk G of the defendant borough, acted pursuant to the statute as registration officer, and the sum which he now claims in respect of each of these years is the correct sum payable as the registration officer's fee under sect. 15, calculated in accordance with the scale promulgated by the Treasury under the order from which I have just quoted. The plaintiff claimed H these fees for 1933, but the claim was ultimately rejected, the defendants contending apparently that, when they employed the plaintiff at a fixed salary, that fixed salary was intended to comprise these statutory fees. While he remained in the defendants' employment as town clerk, the plaintiff continued to claim registration expenses in respect of each year, but the question of whether he was justified in his claim or the defendants were right in their answer to it was never litigated or decided.

It is conceded that the plaintiff did not issue his writ in this action until some time after 12 months from the completion of his work on the register for 1939, the last year in respect of which he brings this action.

The plaintiff's claim was opened by his counsel as a claim on a specialty, and it was said that the period of limitation was, therefore, 12 years under the Limitation Act, 1939, s. 2 (3). The proviso to that subsection, however, expressly enacts that it shall not affect any action for which a shorter period of limitation is prescribed by any other provision of that Act. Under the heading "Actions against Public Authorities," sect. 21 (1) of that Act then enacts, in the same words as were used in the Public Authorities Protection Act, 1893, as follows :

> No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued : Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this subsection, until the act, neglect or default has ceased.

The question is, therefore, does the Limitation Act, 1939, s. 21, apply to this plaintiff's claim, as the defendants plead and contend ? If so, though it be right to call it a specialty, none the less it is statute-barred, since the action was not "commenced before the expiration of one year from the date on which the cause of action accrued." Whether or not sect. 21 applies depends upon whether or not the plaintiff's cause of action is in respect of any neglect or default by the defendants in the execution of any Act of Parliament, duty or authority. It appears to me to be plain that the plaintiff's claim is based upon the statutory duty imposed upon the defendants to pay the fees in question as part of the registration officer's expenses under the Representation of the People Act, 1918, s. 15, and the defendants' neglect or default in the execution of this duty.

The plaintiff cannot and does not point to any other basis of legal responsibility on the part of the defendants to pay those fees. The fees in question are payable by the defendants only because the statute and the order made under the statute enact that the plaintiff, as the registration officer appointed by the Act, shall be entitled to them for doing the work of registration officer imposed on him by the Act. The work of registration officer in respect of which the plaintiff claims to be entitled to these fees was not done at the express or implied request of the defendants, nor was it done under any contract with the defendants, or as incidental to any contract with the defendants to do work for them. It was done in discharge of the public duty imposed on the plaintiff by the Representation of the People Act, 1918, under pain of penalties if the plaintiff did not perform those duties. The defendants could not, therefore, be under any legal duty to pay these fees, apart from the duty imposed upon them as a public authority by the Representation of the People Act, 1918, s. 15, which in express terms imposes on the defendants a statutory duty to pay the registration officer's expenses, including these fees. The cause of action which the plaintiff must rely upon is, therefore, the defendants' neglect or failure to perform this statutory duty to pay. The fact that all that the defendants are required by statute to do in this A instance is to pay money does not make the paying of that money any the less the execution of a statutory duty. Indeed, if the defendants had paid these fees, they must have relied on their having done so in execution of the statutory duty imposed on them by sect. 15 to justify their having recourse to the borough fund or rate for the money so paid.

B There is authority for saying that, where a claim is made for money which a public authority is under a statutory duty to pay, the Public Authorities Protection Act, 1893, applies. In *McManus* v. *Bowes* (1), the plaintiff claimed, amongst other things, a return of certain contributions made by him under the Asylums Officers' Superannuation Act, 1909. C SLESSER, L.J., said, at p. 126 ([1937] 3 All E.R., at pp. 238, 239) :

> The fact is that in 1930, by a decision of the Minister of Health, it was finally determined that he was not entitled to his pension, and from that moment, as I see it, if he were entitled, he came under the Asylums Officers' Superannuation Act, 1909, s. 10, which is to this effect : " (1) An established officer . . . who has not become entitled to a superannuation allowance . . . shall be entitled to receive the aggregate amount of his contributions under this Act." As from the moment when it D had been finally and conclusively determined that he was not entitled to a superannuation allowance, which decision took effect as from the time of the decision of the Minister of Health, he did thereafter become entitled to the return of his contributions, and in my view, the neglect to pay those contributions, to which I will assume he was otherwise entitled, was a neglect within the language of the sections of the Public Authorities Protection Act, 1893, coming directly within the words the neglect of an " act done in pursuance, or execution . . . of any Act of Parliament," namely, a neglect to do that which the Act requires the local authority E to do, that is to say, to return his contributions. Therefore that claim also is barred by reason of the Public Authorities Protection Act.

When *Milford Docks Co.* v. *Milford Haven Urban District Council* (2) is examined, it does not help the plaintiff at all. The action there was brought upon a contract under which the plaintiffs had executed certain F work for the council. COLLINS, M.R., pointed out that that was the real cause of action. That is to say, the public authority was sued, not for a neglect to perform a statutory duty to pay, but for a neglect to perform the duty to pay which arose out of a simple contract. That case and the present afford useful examples of the non-applicability G and the applicability, respectively, of the period of limitation in question. Therefore, I am of opinion that the claim in this action is barred by the Limitation Act, 1939, s. 21, and there must, therefore, be judgment for the defendants with costs.

Judgment for the defendants with costs. Costs to be taxed as between H *solicitor and client in accordance with the provisions of the Public Authorities Protection Act,* 1893.

Solicitors : *John Williams*, agent for *Wood, McLellan & Co.*, Chatham (for the plaintiff) ; *Kenneth Brown, Baker, Baker* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

COLE AND ANOTHER *v.* LYNN.

[Court of Appeal (MacKinnon and Clauson, L.JJ., and Hallett, J.), **October 22, 23, November 6, 1941.**]

Bankruptcy—Deed of arrangement—Reservation of rights of creditors against sureties—Right of surety who has paid to indemnity by debtor.

The appellant's mother guaranteed his debt to a bank. The appellant A subsequently entered into a deed of arrangement with his creditors and the bank and the mother both assented to the deed. The mother died and her executors paid the amount due to the bank under her guarantee. The executors then claimed to be indemnified by the appellant in respect of that payment. It was contended on behalf of the appellant that the covenant in the deed of arrangement not to sue for debts provable in bankruptcy barred the executors' claim :— B

Held : the provisions of the law of bankruptcy were not expressly or by implication imported into the terms of the covenant not to sue, and the express reservation of the rights and remedies of creditors against any surety, upon its proper construction, preserved the surety's consequential rights against the debtor. The executors were, therefore, entitled to succeed in their claim. C

[**EDITORIAL NOTE.** The appellant argued that the mother's assent to the deed afforded him the same release as he would have had in bankruptcy and, therefore, discharged him from all debts provable in bankruptcy. He further contended that the indemnity here claimed by the executors was a contingent liability at the date of the deed and, therefore, a debt provable in bankruptcy. The Court of Appeal have dealt only with the first branch of this argument, and have dealt with that as a matter of construction of the deed of arrangement. Such a deed always D includes a reservation of the rights of creditors against sureties, and the court has held that it is bound by authority to construe this reservation as preserving the right of a surety who has paid under a guarantee to be indemnified by the debtor.

As to Reservation of Rights of Sureties, see HALSBURY, Hailsham Edn., Vol. 2, pp. 445, 446, para. 609 ; and for Cases, see DIGEST, Vol. 5, pp. 1190-1193, Nos. 9612-9631.]

Cases referred to : E

(1) *Kearsley* v. *Cole* (1846), 16 M. & W. 128 ; 5 Digest 1192, *9628* ; 16 L.J.Ex. 115 ; 8 L.T.O.S. 234.

(2) *Close* v. *Close* (1853), 4 De G.M. & G. 176 ; 5 Digest 1193, *9629*.

(3) *Re Paine, Ex p. Read*, [1897] 1 Q.B. 122 ; 5 Digest 856, *7181* ; 66 L.J.Q.B. 71 ; 75 L.T. 316.

(4) *Re Blackpool Motor Car Co., Ltd., Hamilton* v. *Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77 ; 5 Digest 856, *7182* ; 70 L.J.Ch. 61. F

(5) *Re Melton, Milk* v. *Towers*, [1918] 1 Ch. 37 ; 26 Digest 124, *879* ; 87 L.J.Ch. 18 ; 117 L.T. 679.

(6) *Re Whitehouse, Whitehouse* v. *Edwards* (1887), 37 Ch.D. 683 ; 26 Digest 196, *1529* ; 57 L.J.Ch. 161 ; 57 L.T. 761.

Appeal by the defendant from an order dated July 21, 1941, of His Honour Judge Hurst sitting at the Croydon County Court. The facts G are fully stated in the judgment of the court delivered by Clauson, L.J.

W. A. L. Raeburn for the appellant.

B. Stuart Horner for the respondents.

The following cases were referred to in argument : *Kearsley* v. *Cole* (1), *Close* v. *Close* (2), *Re Paine* (3), *Re Blackpool Motor Car Co., Ltd.* (4), H *Re Melton* (5) and *Re Whitehouse* (6).

Clauson, L.J. [delivering the judgment of the court] : The plaintiffs are the executors of Mrs. Mary Lynn, the mother of the defendant. On Aug. 29, 1936, Mrs. Lynn deposited the title deeds of certain property belonging to her with a bank to secure the then existing and future liabilities of her son to the bank, whereupon she became entitled to indemnity from her son in respect of any moneys of hers paid by her to the bank by virtue of the liability thus undertaken by her towards the bank. Her executors have in fact thus paid £15 to the bank, and this action is brought to test the son's contention that he is now under no liability towards his mother's estate in respect of sums so paid or to be paid. On the facts so far stated, there can be no question but that the plaintiffs, the mother's executors, are entitled to judgment against the son for the sum claimed.

The son, however, by way of defence, adduces the fact that, while the mother was alive—namely, on Sept. 9, 1938—he executed, in what is substantially a common form, a deed of arrangement for the benefit of his creditors to which both the bank and his mother assented. At that time, the son owed the bank £811 6*s*. 1*d*., and he owed his mother £203 16*s*. 6*d*. Besides this, she was under liability to the bank for £800 then due to them, and was thus entitled to indemnity against her son in respect of so much of the £800 as should ultimately be borne by her or by her property. It was quite correctly pointed out to the mother that, as matters stood, the figure for which she could claim to rank as a creditor must be limited to the £203 16*s*. 6*d*., as the bank was claiming to rank as a creditor for the £800, in which she was concerned as guarantor, and she accordingly reduced her formal claim to £203 16*s*. 6*d*. The property comprised in the deed of arrangement seems to have been realised by the trustee of the deed in due course and some small dividend seems to have been paid to the bank and to the mother towards their respective debts as so claimed. The bank is left with a considerable debit, in respect of which it claims against the property of the mother comprised in the deposited deeds, or its proceeds. It is plain that she has no answer to such a claim as against the bank, and the £15, the subject-matter of the present claim, has been, admittedly, quite properly paid by the mother's executors to the bank on account of the bank's claim against her property.

The arguments urged by the son as a defence to the claim are as follows. He says (i) that, on the true construction of the deed, the mother's admitted assent to the deed operates to afford him the same release as he would have had by virtue of the Bankruptcy Act, 1914, s. 28, if he had become bankrupt at the date of the deed and had obtained his discharge in due course, (ii) that the effect of sect. 28 is to discharge a bankrupt from all debts provable in bankruptcy, and (iii) that his liability to indemnify his mother was a contingent liability at the date of the deed, and, accordingly, by virtue of sect. 30 (3) of the Act, is to be deemed to bea debt provable in the bankruptcy and barred by the covenant in the deed not to sue.

There are some serious difficulties in the way of the second and third arguments thus put forward, and, although those difficulties were to some extent discussed during the hearing of the appeal, we do not propose to deal with them. It is essential to the son's defence that he should make good his first argument, and, in our opinion, he has failed to do so. On the true construction of the deed of arrangement, we are satisfied that, although the provisions of the law of bankruptcy are to be imported into the deed for the purpose of ascertaining the manner and proportions in which the proceeds of sale of the property comprised in the deed are divisible among the creditors, the extent of the protection obtained by the debtor by virtue of the covenant not to sue is dependent entirely upon the wording of the covenant not to sue contained in the deed, and that the provisions of the law of bankruptcy are not expressly or by implication imported into the terms of that covenant. It thus becomes necessary to construe the covenant not to sue. The material terms of the covenant are that the assenting creditors (of whom, of course, the mother is one) are not to sue on account of their debts, but that (as appears from the proviso to the covenant) the deed is not to affect the rights and remedies of the creditors against any surety. In our opinion, as a matter of construction, the covenant, as limited by this proviso, imports not only that the deed does not affect any creditor's right against a surety, but also that the surety's consequential rights against the debtor are likewise not affected. This point of construction was raised as long ago as 1846 in the Court of Exchequer in *Kearsley* v. *Cole* (1) upon a deed indistinguishable for the material purpose from the present, and, in delivering his judgment, PARKE, B., laid it down clearly that a proviso such as that with which we have to deal not only rebuts what would otherwise be implied—namely, the release of the surety as against the creditor—but also prevents the rights of the surety against the debtor—that is, the right to indemnity—being impaired, for, as PARKE, B., points out, the consent of the debtor that the creditor shall have recourse against him (the surety) is impliedly a consent that the surety shall have recourse against him (the debtor). This point, his Lordship says, must be considered as settled. We have been referred to a number of cases, but to none which throws doubt on the emphatic language used by PARKE, B. It may be that this decision of the Court of the Exchequer is not binding on this court, but we can hardly now, 95 years afterwards, overrule a decision of that court on such a matter as this, even if we feel (which we do not) any doubt as to its correctness. The point, however, came before a court of appeal in *Close* v. *Close* (2), and that decision is binding on us. There TURNER, L.J., adopted the principle that the necessary consequence of the reservation, as between creditor and debtor, of the rights of the creditor against the surety imports the continuance unimpaired of the surety's right of indemnity against the debtor. In our judgment, the county court judge was accordingly right in holding that the son's defence failed. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Braby & Waller* (for the appellant); *Copley, Singleton & Billson*, Croydon (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

END OF VOLUME 3